119-74

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1886.

No. 1150

TOWN OF OREGON, PLAINTIFF IN ERROR,

*vs.*

ELIZA JENNINGS, DEFENDANT IN ERROR.

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ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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Filed October 14, 1886.

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## INDEX.


| | Original. | Print. |
|---|---|---|
| Placita | 1 | 1 |
| Summons and Return | 2 | 2 |
| Amended Declaration | 4 | 3 |
| First Plea (general issue sworn to) | 13 | 12 |
| Amended Second Plea | 14 | 13 |
| Amended Third Plea | 26 | 25 |
| Amended Fourth Plea | 30 | 29 |
| First Replication to Amended Second Plea | 32 | 31 |
| Second Replication to Amended Second Plea | 39 | 38 |
| Third Replication to Amended Second Plea | 42 | 41 |
| Fourth Replication to Amended Second Plea | 43 | 42 |
| Fifth Replication to Amended Second Plea | 45 | 44 |
| Sixth Replication to Amended Second Plea | 45 | 44 |

| | Original. | Print. |
|---|---|---|
| First Replication to Amended Third Plea | 45 | 44 |
| Second Replication to Amended Third Plea | 48 | 47 |
| Third Replication to Amended Third Plea | 53 | 52 |
| Fourth Replication to Amended Third Plea | 53 | 52 |
| Fifth Replication to Amended Third Plea | 54 | 53 |
| First Replication to Amended Fourth Plea | 54 | 53 |
| Second Replication to Amended Fourth Plea | 61 | 60 |
| Third Replication to Amended Fourth Plea | 66 | 64 |
| Fourth Replication to Amended Fourth Plea | 70 | 68 |
| Fifth Replication to Amended Fourth Plea | 70 | 68 |
| Demurrer to Replications | 70 | 68 |
| Demurrer to Replications heard before Mr. Justice Harlan | 73 | 71 |
| Order Overruling Demurrer, reserving right of defendant to raise same questions on trial, etc | 74 | 71 |
| General Rejoinder to all Replications | 75 | 72 |
| Order Empaneling Jury November 7, 1885 | 76 | 72 |
| Orders Continuing Trial November 9th and 10th | 77 | 73 |
| Order Showing Verdict for Plaintiff Under Instructions of Court November 11, 1885, and Motion for New Trial | 78 | 73 |
| Motion for New Trial heard November 24, 1885 | 79 | 74 |
| Order Overruling Motion for New Trial | 79 | 74 |
| Judgment for Plaintiff on Verdict November 24, 1885 | 80 | 74 |
| Bill of Exceptions (containing the following:) | 81 | 74 |
| Stipulation, Waiving all Formalities in Pleading, etc | 82 | 74 |
| Acts to Incorporate Ogle and Carroll County Railroad to be Considered in Evidence | 83 | 75 |
| Plaintiff Offered Transcript of Registry of Bonds in State Auditor's Office | 83 | 75 |
| Defendant's Objection and Exception to Ruling of Court Admitting Same | 84 | 75 |
| Transcript of Registry Bonds in Auditor s Office | 85 | 76 |
| Transcript of Register of Officers in Ogle County | 86 | 77 |
| Further Transcript of Registry of Town Officers, etc | 89 | 78 |
| Copy of one of Bonds Offered by Plaintiff | 90 | 79 |
| Defendant's Objection to Bonds, Ruling of Court, and Exception | 93 | 80 |
| Coupons Offered in Evidence, Objection, Ruling of Court and Exception | 93 | 80 |
| Copy of Coupons | 94 | 81 |
| Stipulation as to Evidence and Admission of Facts of April 28, 1884 | 99 | 82 |
| Additional Stipulation of May 2, 1884 | 102 | 83 |
| Evidence in Wallace Case (referred to in stipulation, containing the following:) | 103 | 84 |
| Testimony of Wm. R. Buser | 103 | 84 |
| Testimony of Geo. W. Hormell | 117 | 88 |
| Testimony of Fred. H. Marsh | 122 | 89 |
| Testimony of Wm. Schultz | 124 | 90 |

| | Original. | Print. |
|---|---|---|
| Testimony of M. W. Smith | 126 | 90 |
| F. H. Marsh, Recalled | 132 | 92 |
| J. H. Cartwright | 146 | 97 |
| Geo. M. Dwight | 154 | 99 |
| Hugh Ray | 162 | 102 |
| Articles of Consolidation (referred to in stipulation of April 28) | 167 | 103 |
| Exhibit I. (petition for election) | 174 | 106 |
| Exhibit J. (election notice) | 179 | 108 |
| Exhibit K. (record of vote) | 183 | 109 |
| Poll List | 184 | 109 |
| Exhibit M. (Potter's appointment) | 187 | 111 |
| Exhibit N. (Potter's bond) | 188 | 112 |
| Exhibit O. (Potter's oath) | 189 | 112 |
| Exhibit P. (Smith's resignation) | 190 | 113 |
| Exhibit Q. (Town Clerk's Letter to County Clerk) | 191 | 113 |
| Stipulation, dated January 24, 1885, as to Judge Blodgett's Charge in Wallace Suit, and Assessed Value of Property and Indebtedness of Town when Bonds were issued | 195 | 114 |
| Charge to Jury in Wallace Suit | 199 | 116 |
| Statement as to Notice and Record of Election held May 24, 1859 | 212 | 122 |
| Verdict in Wallace Suit | 215 | 123 |
| Judgment of Court in Wallace Suit | 216 | 123 |
| Eliza Jennings' Deposition in Wallace Suit | 219 | 124 |
| Alex. Wallace's Deposition in this Suit | 226 | 127 |
| Exhibit A. to Wallace's Deposition | 232 | 129 |
| William S. Wallace's Deposition | 235 | 130 |
| Eliza Jennings' Deposition | 244 | 134 |
| Eliza Jennings' Second Deposition | 253 | 138 |
| Registration of Bonds in Town Supervisor's Book | 258 | 140 |
| Objection thereto, Ruling of Court, and Defendant's Exception | 259 | 140 |
| Potter s Certificate to State Auditor | 260 | 141 |
| Objection thereto, Ruling of Court and Exception | 263 | 142 |
| Geo. M. Dwight's Testimony | 265 | 142 |
| Fred. H. Marsh's Testimony | 267 | 144 |
| Plaintiffs Rest their Case | 269 | 145 |
| Fred. H. Marsh Examined for Defendant | 269 | 145 |
| William J. Mix's Testimony | 278 | 150 |
| Geo. M. Dwight, Recalled by Defendant | 281 | 152 |
| Edward F. Dutcher's Testimony | 281 | 152 |
| The Foregoing was all the Evidence | 292 | 159 |
| Defendant Requested Court to Give Each of the Instructions Numbered from 1 to 23 | 292 | 159 |
| Defendant's Instructions as Requested | 293–304 | 159–64 |
| Refusal of Court to Give Either or any of said Instructions, and Exception of Defendant thereto | 305 | 164 |

| | Original. | Print. |
|---|---|---|
| Instruction of Court that jury Find Verdict for Plaintiff, etc | 305 | 164 |
| Defendant's Exception thereto | 305 | 164 |
| Verdict | 305 | 164 |
| Motion for New Trial | 305 | 164 |
| Motion Overruled and Judgment for Plaintiff on Verdict | 305 | 165 |
| Allowance and Signing of Bill of Exceptions | 306 | 165 |
| Bond on Writ of Error | 307 | 165 |
| Stipulation that Printed Copy of Pleadings be Inserted in Record as Substitute for Prior Manuscript Pleadings | 309 | 166 |
| Certificate of Clerk to Transcript | 310 | 166 |
| Writ of Error | 311 | 167 |
| Citation and Admission of Service thereof | 312 | 167 8 |
| Assignment of Errors | 313 | 168 |

1 Pleas in the Circuit court of the United States for the Northern district of Illinois, held at the United States court rooms, in the city of Chicago, in the district aforesaid, before the Honorable Romanzo Bunn, district judge of the United States for the Western district of Wisconsin, on Tuesday, the twenty-fourth day of November, in the adjourned October term of said court, in the year of our Lord one thousand eight hundred and eighty-five, and of our independence the one hundred and tenth year.

WM. H. BRADLEY, *Clerk.*

Eliza Jennings
17329 *vs.* } *Assumpsit.*
The Town of Oregon.

NORTHERN DISTRICT OF ILLINOIS, ss.

Be it remembered, that on the sixteenth day of February, 1881, there issued out of the clerk's office of the Circuit court of the United States for the Northern district of Illinois, at Chicago, in said district, a writ of summons in said above entitled cause, which said writ, together with the return of the marshal, thereto attached, are in the words and figures following, to wit:

2 SUMMONS.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA—NORTHERN DISTRICT OF ILLINOIS, ss.

THE UNITED STATES OF AMERICA

*To the Marshal of the Northern District of Illinois, Greeting:*

We command you to summon the town of Oregon, if found in your district, to be and appear before our judges of our Circuit court of the United States for the Northern district of Illinois, on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of March next, to answer unto Eliza Jennings of a plea of trespass on the case upon promises to her damage, as it is alleged, of twenty-five thousand dollars, and have you then and there this writ.

Witness, the Hon. Morrison R. Waite, Chief Justice of the Supreme court of the United States of America, at Chicago aforesaid, this 16th day of February, in the year of our Lord one thousand eight hundred and eighty-one, and of our independence the 105th year.

[SEAL.] W. H. BRADLEY, *Clerk.*

SPECIAL DEPUTY'S RETURN.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS. } ss.

Know all men by these presents, that I have appointed, and by these presents do appoint, Henry C. Peck my true and lawful
3 deputy to execute the annexed writ, Eliza Jennings *vs.* The Town of Oregon, and to make return of the execution thereof according to law.

JESSE S. HILDRUP, [SEAL.]
*U. S. Marshal for the Northern District of Illinois.*

I have served the annexed writ in the following manner, to wit: by delivering a true copy thereof to John V. Gale, supervisor of said town of Oregon, therein named, on the 22d day of February, A. D. 1881.

JESSE S. HILDRUP, *United States Marshal.*
By HENRY C. PECK, *Special Deputy.*

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS. } ss.

Henry C. Peck, being duly sworn, deposes and says that he served the annexed writ, as stated in the foregoing return, and that the expense returned by him, in addition to the fees, was actually incurred, and that the same is according to law.

HENRY C. PECK.

Subscribed and sworn to before me this 4th day of March, A. D. 1881.

GEORGE W. HORMELL, *Clerk.*

Endorsed: Filed Mch. 24, A. D. 1881.
W. H. BRADLEY, *Clerk.*

## Plaintiff's Declaration.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS. }

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR SAID NORTHERN DISTRICT.

*Amended first count, filed, by leave of court, as a substitute for the original first count.*

Eliza Jennings, who is a citizen of the State of Ohio, plaintiff in this suit, by S. W. Packard, her attorney, complains of the town of Oregon, a body corporate, existing under and by virtue of the laws of the State of Illinois, and within said Northern district, defendant in this suit, summoned, etc., in a plea of trespass on the case on promises.

For that whereas, heretofore to wit, on the 30th day of March, A. D. 1869, by an act of the legislature of the State of Illinois, entitled "An act to amend an act entitled 'An act to incorporate the Ogle and Carroll County Railroad Company,'" approved on said last mentioned day (and found in volume 3 of the private laws of the State of Illinois, on pages 324, 325 and 326), the defendant, the town of Oregon, was authorized to donate its bonds to the Ogle and Carroll County Railroad Company, to aid in constructing and equipping said road, or any division thereof. The second, fifth and sixth sections of which are as follows:

"SEC. 2. That the first division of said road shall commence on the east bank of Rock river, opposite the town of Oregon, in said county of Ogle; from thence, on the most eligible route, to a connection with the Chicago and Northwestern railway, or with any other railroad leading to the city of Chicago, and the second division, commencing at said point, opposite the said town of Oregon,

and running thence, in a westerly direction, on the most eligible route, to the Mississippi river.

"SEC. 5. That the several towns, villages and cities, organized or incorporated under any laws of this state, along or near the route of said railroad, as authorized to be constructed under the original act and amendment thereto, or under this act, or that are in any wise interested in having said road, or any branch or division thereof, constructed, may, in their corporate capacities, subscribe to the stock of said company, or may make donations thereto, or may lend its or their credit to said company, to aid in constructing and equipping said road, or any division or branch thereof; provided, that no such subscription, donation or loan shall be made until the same shall be voted for as hereinafter provided."

"SEC. 6. That whenever twenty legal voters of any such towns, villages or city shall present to the clerk thereof a written application, requesting that an election shall be held to determine whether such town, village or city shall subscribe to the capital stock of said company, or make a donation thereto, or loan money or bonds or its credit, to aid in the construction of said road, or any branch or division thereof, stating the amount and whether subscribed, donated or loaned, and the rate of interest, and the time of payment, such clerk shall receive and file such application, and immediately proceed to post written notices of an election to be held by the legal voters of such town, village or city, which notices shall be posted in ten of the most public places in such town, village or city, for thirty days preceding such election, and shall state fully the object of such election; and such election shall he held and conducted and return thereof made as is provided by law, and, in any village or city, as is provided by the law under which the same is incorporated, and an additional return shall be made to one of the directors of said company.

"Each elector at such election shall deposit a ballot for said subscription, donation or loan; and if a majority of the legal voters of such town, village or city, voting at such election, shall vote for such subscription, donation or loan, then such town, village or city shall, by its proper corporate authorities, subscribe to the stock of said company, or donate or loan thereto, as shall be determined at said

election, and shall issue to the said railroad company its bonds, in such denominations as said company may designate, not less than one hundred dollars, and bearing interest as may be determined at such election, not to exceed ten per cent. per annum, payable annually at such place as such company may designate, which bonds shall be signed by the supervisor and countersigned by the clerk in towns organized under the township organization law, and in incorporated villages or cities, signed by the president of the board of trustees and countersigned by the clerk or by the officers having similar powers and duties in any such village or city, and any such town, village or city so subscribing, donating or loaning, as aforesaid, shall by its proper corporate authority, annually thereafter, assess and levy a tax upon the taxable property of said town, village or city, sufficient to pay and liquidate the annually accruing interest on such bonds, and so much of the principal thereof as, from time to time, shall become due, which taxes shall be levied and collected in the same manner as other corporation taxes in such town, village or city:

"Provided, that for the payment of the principal thereof such tax shall not exceed two per cent. per annum."

And the plaintiff says that the defendant, the town of Oregon, was, on the date of the approval of said act, to wit, on the 30th day of March, 1869, a town organized under the township organization law then in force in the State of Illinois, and was a town along and near the route of the railroad referred to in the second section of said act, to wit, the Ogle and Carrol County Railroad, as authorized to be constructed by said act, and was interested in having the said road, and especially the said first division thereof, constructed.

And the plaintiff further says that on, to wit, the 24th day of May, A. D. 1870, a written application was presented to the town clerk of said town of Oregon, in said Ogle county, signed by more than twenty legal voters of said town, requesting that an election be held to determine whether such town should in its corporate capacity make a donation to said Ogle and Carroll County Railroad Company of the sum of forty thousand dollars in the bonds of said town in such denominations as said company might designate, not less than one hundred dollars each, payable at the option of said town within twenty years from the date of their issue, bearing interest at

seven per cent. per annum, payable annually, and principal and interest payable at such place as said company might designate, under the provisions of said act, approved March 30th, A. D., 1869, to aid in the construction of the first division of said road, and that the town clerk of said town of Oregon received and filed said application, and in pursuance of the prayer thereof, immediately thereupon, to wit, on the 24th day of May, 1870, duly called and gave notice of such election, as required by the provisions of said act, approved March 30th, A. D. 1869, to be held on the 23d day of June, A. D. 1870, to vote upon the question thus submitted to the voters of said town.

That on the date specified in such notice of election, to wit, on the 23d day of June, A. D. 1870, and in pursuance of such request and notice, and under authority of said act approved March 30t, 1869, an election was held and conducted in said town of Oregon and return thereof made, as was then provided by law.

And the plaintiff says that a large majority of the votes cast at such election were for such donation; that said vote of aid was immediately and before the second day of July, 1870, accepted by said Ogle and Carroll County Railroad Company, and on and before the second day of July, 1870, said railroad company had commenced the construction of the first division of said Ogle and Carroll County railroad, and said vote of aid was on the second day of July, 1870, and the eighth day of August, 1870, and when the bonds and coupons hereinafter referred to were executed and issued, in full force and virtue.

That heretofore, to wit, on the 31st day of December, 1870, at the town of Oregon, in the county of Ogle, in the State of Illinois, and within said Northern district of Illinois, said town of Oregon by its proper corporate authorities, under and in pursuance of, and in conformity with, the provisions of said act approved March 30, 1869, made, executed and issued its forty certain bonds and writings obligatory, each bearing date on the day and year aforesaid, and signed by the supervisor and countersigned by the clerk of said town of Oregon, and numbered respectively as follows: 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60.

That in and by each of said bonds the defendant acknowledged itself to owe, and be indebted to the Ogle and Carroll County Railroad Company in the full and just sum of one thousand dollars, which sum of money said defendant, in and by each of said bonds, agreed and promised to pay to the Ogle and Carroll County Railroad Company or bearer, with interest at the rate of seven per cent. per annum, payable annually on the first day of July, at the office of the Farmers' Loan and Trust Company of New York, in the city of New York, upon the delivery of the coupons severally annexed to such bonds respectively; and the plaintiff says that each of said forty bonds contained on its face, after the said promise and agreement to pay, hereinbefore referred to, and over the signatures of the supervisors and clerk of said town, the following statement or recital, to wit: "For which payment of principal and interest, well and truly to be made, the faith, credit and property of the said town of Oregon are hereby solemnly pledged, under authority of an act of the general assembly of the State of Illinois, entitled "An Act to amend an act entitled 'an act to incorporate the Ogle and Carroll County Railroad Company,' which said act was approved March 30, A. D. 1869. This bond is one of a series numbering from 21 to 60 inclusive, for one thousand dollars each, which bonds, so numbered, together with another series numbered from 1 to 20 inclusive, for $500 each, are the only bonds issued by said town of Oregon under and by virtue of said act."

That said bonds by the terms and conditions thereof were made payable as follows, namely:

Bonds numbered 21, 22, 23 and 24, on first day of July, 1881.
Bonds numbered 25, 26, 27 and 28, on first day of July, 1882.
Bonds numbered 29, 30, 31 and 32, on the first day of July, 1883.
Bonds numbered 33, 34, 35 and 36, on the first day of July, 1884.
Bonds numbered 37, 38, 39 and 40, on the first day of July, 1885.
Bonds numbered 41, 42, 43 and 44, on the first day of July, 1886.
Bonds numbered 45, 46, 47 and 48, on the first day of July, 1887.
Bonds numbered 49, 50, 51 and 52, on the first day of July, 1888.
Bonds numbered 53, 54, 55 and 56, on the first day of July, 1889.
Bonds numbered 57, 58, 59 and 60, on the first day of July, 1890.

That on, to wit: the 31st day of December, 1870, and at, to wit: the place last mentioned, the said defendant, by its proper corporate authorities, delivered said bonds to the railroad company referred to in said act, to wit: to the Ogle and Carroll County Railroad Company, a corporation created and then and there existing under and by virtue of the laws of the State of Illinois, to aid in the construction and equipment of the first division of said road.

That when said bonds were so delivered to said railroad company as aforesaid, there was attached and annexed to each, certain interest coupons to represent the interest accruing thereon numbered with like numbers as the bonds to which said coupons were severally and respectively annexed, which said interest coupons were made, executed and issued to said railroad company by the defendant by its proper corporate authorities, under and in pursuance of, and in compliance with the provisions of said act approved March 30, 1869, and were each and all signed by the supervisor of said town of Oregon, and countersigned by the town clerk of said town, in and by each of which interest coupons so issued with said bonds as aforesaid, the defendant promised to pay to the Ogle and Carroll County Railroad Company or bearer, the sum of seventy dollars at the office of the Farmers' Loan and Trust Company of New York, in the city of New York, for one year's interest on the bond to which such coupon was annexed, upon the presentation of such coupon when due; that said coupons by their terms became due and payable as follows, namely: one on each bond became due and payable on the first day of July 1872, and another on each first day of July thereafter until the maturity of the bond to which such coupons were respectively annexed.

And afterwards, to wit: on the first day of July, 1871, and at, to wit: the said Northern district of Illinois, and before the maturity of the said coupons or any or either of them, the said Ogle and Carroll County Railroad Company, for a good and valuable consideration assigned and delivered to one W. N. Coler the said several bonds, and the said several coupons thereto attached and annexed as aforesaid, and that afterwards and before anyof said bonds or coupons became due or payable, and on, to wit: the day and year, and at, to wit: the last place mentioned the said Coler for a valuable consid-

eration, then and there received from the plaintiff, sold and delivered the said bonds, and interest coupons last above mentioned (except bonds number 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, and 45), with all the coupons issued therewith, to the plaintiff; and that said Coler afterwards and before any of said bonds or coupons became due or payable, and on, to wit: the day and year, and at, to wit: the place last mentioned, for a valuable consideration, then and there received by him from one Alexander Wallace sold and delivered to said Alexander Wallace the said bonds number 29, 30, 31, 32 and 33, with all the coupons issued therewith, and that said Alexander Wallace, afterwards and before any of said bonds or coupons became due or payable, and on, to wit: the day and year, and at, to wit: the place last mentioned for a valuable consideration, then and there received by him from the plaintiff sold and delivered the said bonds and interest coupons last described to the plaintiff; that said W. N. Coler, before any of said bonds or coupons became due or payable on, to wit: the first day of March, 1873, at, to wit: the said place last mentioned, for a valuable consideration, then and there received by him, from one William S. Wallace, sold and delivered to said William S. Wallace the said bonds numbered 34, 35, 36 and 37 with all interest coupons issued therewith, and that said William S. Wallace, afterwards and before any of said bonds or coupons became due or payable, and on, to wit: the day and year, and at, to wit: the place last mentioned, for a valuable consideration then and there received by him from the plaintiff, sold and delivered the said bond, and interest coupons last described to the plaintiff; whereby the plaintiff became and was, and is now the legal holder and owner of each and every one of said coupons, issued with said bonds so sold and delivered to the plaintiff, as aforesaid.

And the plaintiff further says that all of said forty bonds, with the interest coupons issued therewith, were duly registered in the office of the auditor of the State of Illinois, on the fifth day of June, 1871, under the provisions of an act of the legislature of the State of Illinois, entitled "An act to fund and provide for paying the railroad debts of counties, townships, cities and towns," in force April 16, 1869, and that to procure such registration the supervisor of

said town of Oregon, before such registration, certified under oath, as required by said act, that all the preliminary conditions in the said act last above referred to, required to be done to authorize the registration of said bonds, and to entitle them to the benefits of said act last referred to had been fully complied with, which said certificate, before such registration, was filed in and made a part of the public records in said auditor's office; and that after such registration, and on, to wit, the 5th day of June, 1871, and before the said bonds or any of them were purchased by said W. N. Coler, the said auditor, under the provisions of said act last referred to, certified over his signature and seal of office upon each and every of said bonds, as follows, to wit:

"Auditor's Office, Illinois,

"Springfield, June 5, 1871.

"I, Charles E. Lippilcott, auditor of public accounts of the State of Illinois, do hereby certify that the within bond has been registered in this office this day, pursuant to the provisions of an act entitled 'an act to fund and provide for paying the railroad debts of counties, townships, cities and towns,' in force April 16, 1869. In testimony whereof I have hereunto subscribed my hand and affixed the seal of my office the day and year aforesaid."

And the said plaintiff avers that afterwards, to wit, at the maturity of the said several coupons so purchased by the plaintiff as aforesaid, to wit, July first, 1872, and July first, 1873, and July first, 1874, and July first, 1875, and July first, 1876, and July first, 1877, and July first, 1878, and July first, 1879, and July first, 1880, respectively, at the office of the Farmers' Loan and Trust Company of New York, in the city of New York, to wit, at the Northern district of Illinois, aforesaid, the last mentioned coupons were each and every one of them duly presented and exhibited for payment, and payment thereof duly requested, according to the terms of the said coupons respectively, but neither the said defendant, or any person for it, did or would, at the said time of the presentation thereof, as aforesaid, or at any other time before or since said presentation, pay the said several sums of money provided to be paid, and specified in the said several coupons or any or either of them, or any part thereof, but so to do wholly neglected and refused.

And said plaintiff further avers that after the maturity of the said several last mentioned coupons, to wit, July first, 1880 the said several coupons last mentioned and each every of them were duly presented and exhibited to the duly and properly constituted authorities of the town of Oregon, at the office of the treasurer and supervisor of said town, to wit, at said Northern district of Illinois, and payment thereof duly requested, and that such payment was then and there by said treasurer and supervisor refused.

By means of the premises the defendant became liable to pay, and then and there, in consideration thereof, promised the said plaintiff to pay her the said several sums of money in the said last mentioned coupons, respectively mentioned, and therein specified and provided to be paid with interest thereon, since the maturity thereof respectively.

Yet, though often requested, the said defendant, not regarding the said promise and undertaking, did not nor would pay the said plaintiff when thereunto so requested, as aforesaid, or at any time before or afterwards, the said several sums of money or any or either of them, or any part thereof, but so to do hath hitherto wholly neglected and refused, and still doth neglect and refuse.

[Here follows the common counts with the *ad damnum* put at $25,000].

COPY OF INSTRUMENTS SUED ON.

[There are attached to the declaration copies of 193 coupons, being coupons due July 1, 1873, July 1, 1874, July 1, 1875, July 1, July 1, 1876, July 1, 1877, July 1, 1878, July 1, 1879, and July 1, 1880, from twenty-four bonds, numbered 29 to 37, inclusive, and 46 to 60, inclusive; also one coupon, due July 1, 1872, from bond No. 46. Each coupon is for $70. Face value of all coupons, $13,510.

The coupons are alike, except in number and date of maturity. The following is a copy of one:]

"STATE OF ILLINOIS, COUNTY OF OGLE.

"The Town of Oregon will pay to the Ogle & Carroll County "Railroad Company, or bearer, seventy dollars, at the office of the

"Farmers' Loan and Trust Company of New York, in the City of "York, on the first of July, 1873, on presentation, being one year's "interest on Bond No. 29.

"E. S. POTTER, Supervisor.

"F. H. MARSH, Clerk."

Original declaration marked:

"Filed Feb. 25, 1881. WM. H. BRADLEY, *Clerk*."

Amended first count marked:

"Filed May 3, 1884. WM. H. BRADLEY, *Clerk*."

## Defendant's Pleas.

*The plea first is the general issue, which is as follows:*

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS. } ss.

IN THE CIRCUIT COURT OF THE UNITED STATES, IN AND FOR SAID DISTRICT. MARCH TERM, A. D. 1881.

Eliza Jennings
*v.*
The Town of Oregon. } *Assumpsit.*

And now comes the defendant, the said town of Oregon by Edsall & Hawley, its attorneys, and defends, &c., when, &c., and says that it did not undertake or promise in manner and form as the plaintiff hath above thereof complained against it, and of this the defendant puts itself upon the country.

EDSALL & HAWLEY,
*Attorneys for Defendant.*

STATE OF ILLINOIS,
OGLE COUNTY. } ss.

John V. Gale, being duly sworn, says that he is the supervisor of the town of Oregon, the defendant in the above entitled cause; that he has read the foregoing plea of said defendant and knows the contents thereof, and that the said plea is true in substance and in fact.

JOHN V. GALE,
*Supervisor.*

Subscribed and sworn to before the undersigned notary public in and for said Ogle county, this first day of April, A. D. 1881. Witness my hand and notarial seal.

[SEAL.] C. M. GALE,
*Notary Public.*

*Amended 2nd Plea.* And for a further plea in this behalf, the defendant says *actio non*, because it says that the said several causes of action in the said declaration mentioned are one and the same, to wit, the said bonds and interest coupons, and the said supposed cause of action based thereon in the amended first count of said declaration mentioned, and not other and different; and that the making and execution of the said bonds and interest coupons, in the said plaintiff's declaration declared upon, was obtained by fraud and circumvention, that is to say, that the said Ogle and Carroll County Railroad Company, in the declaration mentioned, had authority to build a certain railroad in the State of Illinois, described in an amendment to the charter of said company, as follows, to wit: An act of the general assembly of Illinois, entitled "an act to amend an act entitled 'an act to incorporate the Ogle and Carroll County Railroad Company,'" approved March 30, 1869, the second section of which is in these words: "§ 2. That the first division of said road shall commence on the east bank of Rock river, opposite the town of Oregon, in said county of Ogle, from thence, on the most eligible route, to a connection with the Chicago and Northwestern railway, or with any other railroad leading to the city of Chicago, and the second division commencing at said point opposite the said town of Oregon, and running thence, in a westerly direction, on the most eligible route, to the Mississippi river."

And the defendant avers that, at the time of the passage of said act, there was a village on the west bank of said Rock river, then commonly called the town of Oregon, and that said village was and is the town of Oregon referred to in said section as the town of Oregon, opposite which said first division of said railroad was so to commence, and that the township of Oregon, the defendant in this suit, under the name of "Town of Oregon," was one of the organized townships of said Ogle county, situate, in part, upon the east, as well

as upon the west side of said Rock river, and extended eastward from said river two miles and upwards, and embraced within its limits the said village commonly so called the town of Oregon.

And the defendant avers that, to wit, on the 24th day of May, A. D. 1870, an application, in writing, or petition, was presented to the town clerk of said defendant town of Oregon, in said Ogle county, signed by more than twenty legal voters of said town, and which said petition was substantially in the words and figures following, to wit:

*To the town clerk of the town of Oregon, in the county of Ogle, and State of Illinois:*

We the undersigned, legal voters of the said town of Oregon, in the county and state aforesaid, do hereby make application to you, and request that an election shall be held in said town under the provisions of an act of the general assembly of the State of Illinois, entitled "An act to amend an act, entitled 'an act to incorporate "the Ogle and Carroll County Railroad Company,' approved March 30th, A. D. 1869," to determine whether said town shall, in its corporate capacity, make a donation to the said Ogle and Carroll County Railroad Company, of the sum of forty thousand dollars in the bonds of said town, in such denomination as said company may designate, not less than one hundred dollars each, payable at the option of said town within twenty years from the date of their issue, bearing interest from date at the rate of seven per cent. per annum, payable annually, and principal and interest payable at such place as said company may designate, to aid in the construction of the first division of said Ogle and Carroll county railroad; said bonds not to be issued, dated or delivered until said company shall have completed said first division of said railroad with a T rail weighing not less than forty-five pounds to the yard, in condition to run trains thereon from a connection or intersection with the Chicago and North Western railway, to a point at and within said town of Oregon, within one-half mile of the east bank of Rock river, and shall have equipped the same with rolling stock sufficient to operate a daily train to and from said town for the accommodation of passengers and freight, nor until said company shall have released said town

from all liabilities on account of donations heretofore voted, except a donation of ten thousand dollars voted by said town on the 9th day of December, A. D. 1869; said vote and donation of forty thousand to be null and void, unless said first division of said railroad shall be completed and equipped as aforesaid, on or before the first day of January, A. D. 1871; but in case the same shall be so completed and equipped within the time aforesaid, and said company shall execute and deliver said release, then said bonds to be delivered upon the demand of said company, and to bear date the day of delivery, and we request that immediate notice be given of such election, and that the same be held on the 23d day of June, A. D. 1870.

Dated the 24th day of May, 1870.

[Here follow signatures.]

And that in pursuance of the prayer of said petition, the town clerk of said town of Oregon thereupon, to wit: on the 24th day of May, A. D. 1870, called and gave notice of such election and town meeting to vote upon the question thus desired to be submitted to the voters of said town, and which said notice of such election so given by the town clerk of said town is substantially in the words and figures following:

"Whereas, more than twenty legal voters in the town of Oregon, in the county of Ogle, and State of Illinois, have presented a written application requesting that an election should be held in said town under the provisions of an act of the general assembly of the State of Illinois, entitled, 'An act to amend an act, entitled, 'an act to incorporate the Ogle and Carroll County Railroad Company,' approved March 30, A. D. 1869, to determine whether said town shall in its corporate capacity make a donation to the said Ogle and Carroll County Railroad Company of the sum of forty thousand dollars in the bonds of said town, in such denominations as said company may designate, not less than one hundred dollars each, payable at the option of said town within twenty years from the date of issue, bearing interest from date at the rate of seven per cent. per annum, payable annually, and principal and interest payable at such place as said company may designate, to aid in the construction of the first

division of said Ogle and Carrrol county railroad, said bonds not to be issued, dated or delivered, until said company shall have completed said first division of said railroad, with a T rail weighing not less than forty-five pounds to the yard, in condition to run trains thereon, from a connection or intersection with the Chicago and Northwestern railway to a point at and within said town of Oregon, within one-half mile of the east bank of Rock river, and shall have equipped the same with rolling stock sufficient to operate a daily train to and from said town for the accommodation of passengers and freight, nor until said company shall have released the town from all liability on account of donations heretofore voted, except a donation of ten thousand dollars voted by said town on the 9th day of December, A. D. 1869; said vote and donation of forty thousand dollars to be null and void unless said first division of said railroad shall be completed and equipped as aforesaid on or before the first day of January, A. D. 1871, but in case the same shall be completed and equipped within the time aforesaid, and said company shall execute and deliver said release, then the said bonds to be delivered upon the demand of said company, and to bear date the day of delivery. The inhabitants, legal voters of the said town of Oregon, are therefore hereby notified that an election will be held by the legal voters of said town at the court house in said town of Oregon, on Thursday, the 23d day of June, A. D. 1870, at nine o'clock in the forenoon of said day, for the object and purpose of voting upon and determining the matters and questions hereinbefore and in said written application set forth and contained.

Given under my hand at my office in said town of Oregon, this 24th day of May, 1870.

[Signed.] FRED H. MARSH,
*Town Clerk.*"

And the defendant avers that the election thus called was accordingly held in said town of Oregon on the 23d day of June, 1870, in pursuance of the said petition and notice thus given to vote upon the question thus submitted to the legal voters of said town by virtue of said petition and notice, and upon no other question, and that at said election a majority of the votes cast were for such donation upon

the terms and conditions prescribed in said petition and notice; and that the officers of said town were never in any manner authorized to issue the said bonds and coupons declared upon by the plaintiff upon other conditions, or without compliance with the said conditions thus provided as will more fully appear from the public records of said town of Oregon in that behalf.

And the defendant further avers that the said Ogle and Carrol County Railroad Company on the first day of June, A. D. 1870, and long before the making and signing of the bonds and coupons declared upon, made, executed and entered into articles of consolidation with a certain other railroad company organized under the laws of the State of Illinois, known as the Chicago and Iowa Railroad Company, whereby the said two companies agreed to combine and consolidate their respective capital stocks, franchises, grants, immunities, privileges, capacities, properties, rights-of-way, and all their property, real, personal and mixed, into one company and corporation under the corporate name, "The Chicago and Iowa Railroad Company."

And the defendant avers that both the said Ogle and Carroll County Railroad Company and the said Chicago and Iowa Railroad Company neglected and failed to comply with said conditions thus prescribed upon which said donation was so authorized to be made, and that the said Ogle and Carroll County Railroad Company did not, nor did the said Chicago and Iowa Railroad Company, nor did any one for them, or either of them, complete said first division of said railroad with a T rail weighing not less than forty-five pounds to the yard, or otherwise, in condition to run trains thereon, from a connection or intersection with the Chicago and North-Western railway to a point at and within said town of Oregon, within one-half mile of the east bank of Rock river; and did not equip the same with rolling stock sufficient to operate a daily train to and from said town, for the accommodation of passengers and freight, on or before the first day of January, A. D. 1871, but then and there wholly failed so to do, whereby the said vote and authority to issue said bonds and coupons became and was wholly void; and neither of said railroad companies ever acquired any right or authority to claim or have said bonds issued; nor had the officers of said town any

meeting for such election was not only prescribed by law, but public notice thereof had been given by the said Frederick H. Marsh as such town clerk as prescribed by law, of all which the railroad companies and their officers aforesaid, then and there, had full notice at the time of the fraudulent conspiracy to appoint said Elias S. Potter supervisor, and the signing of said bonds, as hereinafter alleged.

And the defendant further avers, that in the night of the 3d day of April, A. D. 1871, and immediately preceding the said town meeting so to be held for the election of a supervisor of said town, the said Frederick G. Petrie, James V. Gale, Elias S. Potter, Francis E. Hinckley, James H. Cartwright, and Frederick H. Marsh, then and there being respectively such officers as aforesaid, attorney and agent of said Chicago and Iowa Railroad Company, and of the said Ogle and Carroll County Railroad Company, so far as it had any existence in fact, then and there fraudulently conspired together to procure an apparent, though false and fraudulent appointment ofthe said Elias S. Potter, as supervisor of said town, and to make it falsely and fraudulently appear that he had been appointed and qualified for said office on the 31st day of December, A. D. 1870, and that the said bonds had been signed by him on that day, in the night of said third day of April, A. D. 1871, procured and induced the said James H. Cartwright, who was then and there such attorney of said railroad company, as well as one of the justices of the peace of the said town, together with the said Frederick H. Marsh, who was then the clerk of said town, and was then, or soon thereafter, made the agent of said company, to sign a pretended, false and fictitious appointment of the said Elias S. Potter to the office of supervisor of said town, dated and purporting to have been made and signed on the 31st day of December, A. D. 1870, instead of the 3d day of April, 1871, when such pretended appointment was, in fact, made and signed as aforesaid; and that the said Elias S. Potter then and there subscribed an official oath as such supervisor, on the night of said 3d day of April, 1871, and the said James H. Cartwright subscribed the jurat thereto, bearing date, and purporting to have been made on the said 31st day of December, A. D. 1870, and the said Elias S. Potter as principal, together with the said Frederick G.

Petrie and James V. Gale, as sureties, on said 3d day of April, 1871, and in the night time, as aforesaid, signed a pretended official bond of the said Potter as such supervisor, falsely and fraudulently dated and purporting to have been made on the 31st. day of December, A. D. 1870, in order that it might falsely be made to appear that the said Potter had qualified as such supervisor on said last mamed day, and thus have colorable authority to act as the supervisor of said town, and sign said bonds and coupons; and that thereupon the said railroad companies acting through the said officers and agents aforesaid, secretly and fraudulently, in the night time of the night next preceding the 4th day of April 1871, caused and induced the said Elias S. Potter as such pretended supervisor, and the said Frederick H. Marsh as such town clerk, to sign and execute in behalf of said town of Oregon, the bonds and coupons sued upon and deliver the same thus signed, to said Ogle and Carroll County Railroad Company, or to Francis E. Hinckley, who was, then and there, the president of said Chicago and Iowa Railroad Company as aforesaid; and that said bonds and coupons were not otherwise signed or executed by, or in behalf of the said town of Oregon.

And the defendant further avers that the said railroad companies and that said Francis E. Hinckley, Frederick G. Petrie, James V. Gale, Elias S. Potter, James H. Cartwright and Frederick H. Marsh, and each of them then and there at the time of such signing and pretended issue of said bonds and coupons, well knew that the said conditions upon which said bonds and coupons had been so authorized to be issued by the said vote of the electors of the said town of Oregon, had not been complied with, and that neither the said Ogle and Carroll County Railroad Company, nor the said Chicago and Iowa Railroad Company or any other party or person were lawfully entitled to have said bonds or coupons issued to them, or either of them; and then and there well knew that the legal voters of said town would not elect a supervisor thereof who would sign or issue said bonds and coupons, unless such supervisor was so directed and required by the judgment of some court of competent jurisdiction; and then and there well knew that the said William Schultz would not join or participate in any such appointment of the said Potter as such supervisor for the purpose aforesaid, and the said William

Schultz who was then and there one of the justices of the peace of said town, had no notice of, and was not present at, and in no wise participated in, said pretended appointment of the said Potter as such supervisor; and that the said Potter had no other color or claim of right to act as such supervisor in behalf of said town, than that which he so derived from such fraudulent appointment so made, and in the manner and for the purposes aforesaid.

And the defendant avers that the said Potter never publicly acted as such supervisor by virtue of such appointment or otherwise, except in the signing of said bonds and coupons, which was done secretly and in the night time in the manner aforesaid; and the fact of his having so signed said bonds was concealed from the public and citizens of said town for a long time, to wit: for the period of three months thereafter; and that the said Elias S. Potter did not at any time under or by virtue of said appointment assume to be or act as such supervisor of said town, except in said secret and clandestine attempt to issue said bonds and coupons, and that he did not act as such supervisor with the knowledge or acquiescence of the public or citizens of said town, and did not in fact or in law, become either the legal or acting supervisor of said town, and at the time of the signing of said bonds was neither a legal or acting supervisor thereof.

And the defendant avers that the said Potter in the night of the said 3d day of April, 1871, or at some time subsequent thereto, in order to give greater apparent authority to his act in signing said bonds and coupons, and to make it falsely appear that he had otherwise acted as supervisor, with the connivance of the said Marsh, who had the custody of the town records as such town clerk, signed and added his name as such supervisor to the records of the meeting of the officers of said town, held between the 31st day of December, 1870, and the 31st day of April, 1871, and thereby made a false and fraudulent record which apparently showed him to have been present at said meetings of said town officers, and to have participated therein in the capacity of supervisor of said town, whereas in truth, and in fact, as the said Potter and the said Marsh, then well knew, the said Potter was not present at any of said meetings of said town officers, and in no wise participated therein, and at the time the same were

held, did not have or pretend to have any color of right to act as such supervisor, and the defendant further avers that the said making of the said pretended appointment of the said Potter as such supervisor, and his pretended qualification by the taking of an official oath, and the filing of an official bond as aforesaid, and the signing of said bonds and coupons aforesaid, and falsely antedating all said papers as aforesaid, and the signing and entry of the name of said Potter upon said town records as such supervisor, were all parts and parcels of the same transaction, and were a fraudulent scheme and device to wrongfully procure the issuance of said bonds and coupons, and thereby defraud and injure the said defendant the town of Oregon, and its citizens and tax-payers, and that by means of such fraud the execution of said bonds and coupons were obtained and not otherwise.

And the defendant further avers that by virtue of the laws of the State of Illinois in that behalf, and the said act of the general assembly before mentioned, said bonds and coupons could not be lawfully issued without a compliance with, and performance of the said conditions upon which the said donation was so voted as aforesaid, and that in case said conditions had been performed and complied with, said bonds and coupons could not be lawfully executed and issued so as to be obligatory upon the defendant without being first signed by the supervisor, and countersigned by the town clerk of said town as more fully appears by the said act, and the laws of the State of Illinois in that behalf, and the defendant avers that the said bonds and coupons were not signed by the supervisor of said town, but were fraudulently signed by the said Potter, so falsely assuming and pretending to be such supervisor in manner aforesaid.

And the defendant further avers that neither the said Ogle and Carroll County Railroad Company nor the said Chicago and Iowa Railroad Company, completed the said first division of the said Ogle and Carroll county railroad, as required by the terms and conditions upon which said donation was authorized to be made, but that after having fraudulently obtained said bonds and coupons to be signed and delivered as aforesaid, the said Chicago and Iowa Railroad Company changed the course and line of said first division

of said railroad so defined as aforesaid, by commencing at a point a long distance, to wit, three miles east of the western terminus of said first division of said railroad, so defined in said charter, and deflected the line of said railroad to the southward so as to cross said Rock river and pass a long distance, to wit, one mile south of the village of Oregon aforesaid, so designated in the charter of said Ogle and Carroll County Railroad Company as the town of Oregon, to the great detriment and injury of the tax-payers of the said town of Oregon.

And the defendant denies that to procure the alleged registration of said bonds the supervisor of the said town of Oregon certified under oath, as alleged in the amended first count of the declaration, that all the preliminary conditions in the said act in the declaration mentioned, in force April 16, 1869, required to be done to authorize the registration of said bonds, and to entitle them to the benefits of said act, had been fully complied with, in manner and form as the plaintiff hath in her amended first count alleged; and on the contrary thereof the defendant avers that the supervisor of said town did not make and transmit to the auditor of public accounts of the State of Illinois any such certificate; and that if any paper purporting to be such certificate was made and transmitted, it was done by some person who was not at the time supervisor of said town, and as a part of and to consummate said fraudulent conspiracy to make the said town liable on said bonds so fraudulently issued in the manner aforesaid.

And so the defendant in fact saith, that the execution of said bonds and coupons was obtained by fraud and circumvention, and this the defendant is ready to verify.

Wherefore it prays judgment, etc.

EDSALL & HAWLEY,
*Attorneys for Defendant.*

Original second plea.
Endorsed.
Filed April 5, 1881.

W. H. BRADLEY, *Clk.*

1st, 2d, 3d, 4th, 5th, 6th amendments to second plea. Endorsed.
Filed May 6, 1884.

W. H. BRADLEY, *Clk.*

7th, 8th, 9th amendments to second plea. Endorsed.
Filed May 12, 1884.

W. H. BRADLEY, *Clk.*

All of which amendments, together with the original second plea, are embodied in the foregoing.

## AMENDED THIRD PLEA.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Eliza Jennings,
*v.*
The Town of Oregon.

And now comes the defendant by Edsall & Edsall, its attorneys, and by leave of the court first had and obtained, as and for its amended third plea in this behalf, says *actio non*, etc., because, it says that the said several supposed causes of action in each of the several counts of the plaintiff's declaration mentioned, consist of the coupons in the amended first count of said declaration declared upon, and are not in fact, other and different causes of action.

And the defendant avers that the value of the taxable property within the said town of Oregon as ascertained by the last assessment for state and county taxes next previous to the execution and issuing of said bonds and coupons, and the incurring of the supposed indebtedness in the declaration mentioned, was less than two hundred thousand dollars ($200,000), to wit, for the year, A. D. 1870, was as follows, to wit: the sum of one hundred and fifty-one thousand, three hundred and seventy-nine dollars ($151,379, as assessed by the town assessor of said town of Oregon, and which

assessment so made by said town assessor was equalized by the board of supervisors of the county of Ogle, in which said town is situated, at and reduced to the sum of one hundred and forty-one thousand, nine hundred and eighty-five dollars ($141,985), and the said equalized assessment so made by the said board of supervisors, was for the said year equalized by the board of equalization of the State of Illinois, at, and increased to, the sum of one hundred and eighty-seven thousand, three hundred and ten dollars ($187,310), and that such assessed value of the taxable property within said town as ascertained by the last assessment for state and county taxes previous to the incurring of the supposed indebtedness declared upon, did not exceed said last-mentioned sum; and the defendant avers that at the time of the execution and issuing of the said bonds and coupons, and the incurring of the supposed indebtedness in the declaration declared upon, said town of Oregon had before that time contracted and then owed indebtedness to an amount exceeding ten thousand dollars, to wit, to the amount of eleven thousand dollars, other than the said forty bonds for $1,000 each, and the coupons thereto attached, in the declaration mentioned; and that such indebtedness of said town then and there exceeded in amount, five per centum on the value of the taxable property within said town as so ascertained by the last assessment for state and county taxes, previous to the incurring of the supposed indebtedness in the declaration declared upon.

And the defendant avers that the said forty bonds for one thousand dollars each, numbered from 21 to 60 inclusive, with the interest coupons attached, as stated in the amended first count of the declaration, were not executed or issued until long after the eighth day of August, A. D. 1870, and after the adoption of the present constitution for the State of Illinois in that year, and that the said forty bonds and coupons thereto attached, were issued as one and the same series of bonds, at the same time, and as parts of the same transaction; and the defendant avers that the indebtedness thereby sought to be created against the said town, including such prior and then existing indebtedness of said town, then and there amounted to a sum exceeding fifty thousand dollars, to wit, the sum of fifty-one thousand dollars, and then and there amounted to not

less than twenty-six per centum, and greatly exceeded five per centum, on the value of the taxable property within said town of Oregon, as ascertained by the last assessment for state and county taxes, previous to the incurring of the supposed indebtedness in the declaration mentioned.

And the defendant further avers that the said written application for, and notice of election in the amended first count of the plaintiff's declaration mentioned, each contained a provision, in substance and effect, in the words and figures following:

"Said bonds not to be issued, dated or delivered, until said company shall have completed said first division of said railroad with a T-rail weighing not less than forty-five pounds to the yard, in condition to run trains thereon, from a connection or intersection with the Chicago and North Western railway to a point at and within said town of Oregon within one-half mile of the east bank of Rock river, and shall have equipped the same with rolling stock sufficient to operate a daily train to and from said town for the accommodation of passengers and freight, nor until said company shall have released town from all liability on account of donation heretofore voted, except a donation of ten thousand dollars voted by said town on the ninth day of December, A. D. 1869; said vote of forty thousand dollars to be null and void unless said first division of said railroad shall be completed and equipped as aforesaid, on or before the first day of January, A. D. 1871; but in case the same shall be so completed and equipped, within the time aforesaid, and said company shall execute and deliver said release, then the said bonds to be deliverable upon the demand of said company, and to bear date of the day of delivery."

And the defendant says that although it may be true that at a special town meeting held in said town on said 23d day of June 1870, presided over by a moderator, a majority of the votes cast thereat were in favor of the said proposition so submitted to the legal voters of said town, yet the same was not otherwise submitted to said legal voters, or voted upon by them; and the defendant avers that there was no election held in said town upon the question of issuing said bonds, or making said donation, presided over and held

by the judges of election of said town, and that the said supposed election in the amended declaration mentioned was not held or presided over by the judges of election of said town.

And the defendant further avers that the said Ogle and Carroll County Railroad Company did not, nor did any one for said company in any wise comply with the said conditions upon which the said bonds and donation were so voted; and did not complete said first division of said railroad in condition for trains to run thereon, from the connection or intersection with the Chicago and North-Western railway, to a point at and within said town of Oregon, within one half mile of the east bank of Rock river, and equip the same with rolling stock sufficient to operate a daily train to and from said town for the accommodation of passengers and freight, on or before the 1st day of January, A. D. 1871, but wholly failed so to do; whereby the said vote in favor of the issuing of said bonds and making said donation became and was null and void, according to the terms thereof; and the defendant avers that said bonds were not issued in compliance with any vote of the people of said town of Oregon had prior to the adoption of the constitution of the State of Illinois on the 8th day of August, A. D. 1870, in pursuance of any law providing therefor; and so the defendant in fact saith that the said bonds and coupons were issued without authority of law, and in violation of the constitution of the State of Illinois, and are therefore void as against said town. And this the defendant is ready to verify, wherefore it prays judgment, etc.

EDSALL & EDSALL,
*Attorneys for Defendant.*

Endorsed:

Filed May 6, 1884.
W. H. BRADLEY, *Clerk.*

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

The Town of Oregon
*ads.*
Eliza Jennings.

*Amended Fourth Plea.* And now comes the said town of Oregon, the defendant, by Edsall, Hawley & Edsall, its attorneys, and for a further plea in this behalf says, *actio non*, because it says that the several causes of action in the amended declaration mentioned are one and the same, to wit: the said bonds and interest coupons, and the supposed cause of action based thereon in the amended first count of said plaintiff's declaration mentioned, and not other and different; and that the said bonds and coupons in the declaration mentioned and declared upon were not executed, signed or delivered by the supervisor and town clerk of said town of Oregon, or any persons claiming to act in behalf of said town, until long after the second day of July, A. D. 1870, to wit: on the third day of April, A. D. 1871, when the same were so signed and executed by Elias S. Potter, pretending to act as supervisor, and one Frederick H. Marsh, as town clerk of said town, *as alleged in the second plea, and that the same were not otherwise executed, signed or delivered;* and the defendant avers that the execution and delivery of said bonds were never authorized by a vote of the people of said town at any election held therein on or prior to the 2d day of July, A. D. 1870, whereat the judges of election of said town, or any persons assuming to act as such judges, presided or acted as such judges, but that the only pretense or claim of authority for the issuance of said bonds was a vote purporting to authorize a donation by said town of $40,000 to said Ogle and Carroll County Railroad Company, taken at a special town meeting held in said town on the 23d day of June, A. D. 1870, at which said special town meeting one E. J. Rieman acted as moderator and F. H. Marsh acted as town clerk; and the defendant avers that at said special town meeting neither the supervisor, assessor nor collector of said town, nor any other persons acting as such officers, in any manner acted as judges of election, *and the defendant avers that at the time of the holding of said special town*

*meeting there was no law in force in any manner authorizing a vote at a town meeting to be taken in said town of Oregon upon the question as to whether the said town should issue such bonds and coupons or make any donation to said Ogle and Carroll County Railroad Company, and that the said vote so taken at said special town meeting was wholly without authority of law.*

And the defendant avers that afterwards, to wit: on the 3d day of April, 1871, and long after the second day of July, A. D. 1870, the said Elias S. Potter, then claiming to act as supervisor of said town, and said Frederick H. Marsh, the town clerk of said town, without any other authority so to do than such vote so taken at said special town meeting, signed and issued the said bonds and coupons in the declaration mentioned, and delivered the same as a donation to said railroad company, and for no other purpose and without any other consideration. And the defendant avers that the supervisor of said town of Oregon did not certify under oath, as required by the said act in force April 16, 1869, in the amended first count of the declaration mentioned, that all the preliminary conditions in said act required to be done to authorize the registration of said bonds, and to entitle them to the benefits of said act, had been fully complied with, and transmit such certificate to the state auditor to procure the registration of said bonds under the provisions of said act. And so the defendant in fact saith that the said bonds and coupons are void, and never became obligatory upon said town, and this the defendant is ready to verify, wherefore it prays judgment, etc.

EDSALL, HAWLEY & EDSALL,
*Attorneys for Defendant.*

Endorsed:
Filed December 22, 1882.
W. H. BRADLEY, *Clerk.*

## Plaintiff's Replications.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS.

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR SAID NORTHERN DISTRICT.

Eliza Jennings
*v.*
The Town of Oregon. } *Assumpsit.*

FIRST REPLICATION TO AMENDED SECOND PLEA.

And the said plaintiff saith that the said defendant ought not to be admitted or received to plead said amended plea by it secondly above pleaded as to all or any of the matters or things therein averred; because, she says, that said Elias S. Potter, so pretending to act as supervisor of said town of Oregon, and said Fred. H. Marsh the town clerk of said town, signed, executed and delivered the whole forty thousand dollars of bonds voted by said town with all the interest coupons attached to such bonds under the same authority, to wit: the act approved March 30, 1869, before referred to, and the vote of the legal voters of the said town, taken in pursuance of the provisions of said act on the 23d day of June, 1870, and for the same consideration, and at the same time, and as a single transaction, and that all of said forty bonds bear the same date, and are alike in every respect except as to date of maturity which is as stated in the first count of the declaration, and to each bond when issued, there were attached certain interest coupons, each for seventy dollars, the first falling due on the first day of July, 1872, and the next on the first day of July, 1873, and another one on the first day of every month of July thereafter, until the maturity of the bond to which such coupon was attached: That such coupons were signed at the same time that the said bonds were signed by said Potter, as such supervisor, and by said Marsh as town clerk, as aforesaid, and as a part of one common transaction, and all the matters and things so alleged by the said defendant as a defense to the coupons declared on in the plaintiff's

*meeting there was no law in force in any manner authorizing a vote at a town meeting to be taken in said town of Oregon upon the question as to whether the said town should issue such bonds and coupons or make any donation to said Ogle and Carroll County Railroad Company, and that the said vote so taken at said special town meeting was wholly without authority of law.*

And the defendant avers that afterwards, to wit: on the 3d day of April, 1871, and long after the second day of July, A. D. 1870, the said Elias S. Potter, then claiming to act as supervisor of said town, and said Frederick H. Marsh, the town clerk of said town, without any other authority so to do than such vote so taken at said special town meeting, signed and issued the said bonds and coupons in the declaration mentioned, and delivered the same as a donation to said railroad company, and for no other purpose and without any other consideration. And the defendant avers that the supervisor of said town of Oregon did not certify under oath, as required by the said act in force April 16, 1869, in the amended first count of the declaration mentioned, that all the preliminary conditions in said act required to be done to authorize the registration of said bonds, and to entitle them to the benefits of said act, had been fully complied with, and transmit such certificate to the state auditor to procure the registration of said bonds under the provisions of said act. And so the defendant in fact saith that the said bonds and coupons are void, and never became obligatory upon said town, and this the defendant is ready to verify, wherefore it prays judgment, etc.

EDSALL, HAWLEY & EDSALL,
*Attorneys for Defendant.*

Endorsed:
Filed December 22, 1882.
W. H. BRADLEY, *Clerk.*

## Plaintiff's Replications.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS.

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR SAID NORTHERN DISTRICT.

Eliza Jennings
*v.*
The Town of Oregon. } *Assumpsit.*

FIRST REPLICATION TO AMENDED SECOND PLEA.

And the said plaintiff saith that the said defendant ought not to be admitted or received to plead said amended plea by it secondly above pleaded as to all or any of the matters or things therein averred; because, she says, that said Elias S. Potter, so pretending to act as supervisor of said town of Oregon, and said Fred. H. Marsh the town clerk of said town, signed, executed and delivered the whole forty thousand dollars of bonds voted by said town with all the interest coupons attached to such bonds under the same authority, to wit: the act approved March 30, 1869, before referred to, and the vote of the legal voters of the said town, taken in pursuance of the provisions of said act on the 23d day of June, 1870, and for the same consideration, and at the same time, and as a single transaction, and that all of said forty bonds bear the same date, and are alike in every respect except as to date of maturity which is as stated in the first count of the declaration, and to each bond when issued, there were attached certain interest coupons, each for seventy dollars, the first falling due on the first day of July, 1872, and the next on the first day of July, 1873, and another one on the first day of every month of July thereafter, until the maturity of the bond to which such coupon was attached: That such coupons were signed at the same time that the said bonds were signed by said Potter, as such supervisor, and by said Marsh as town clerk, as aforesaid, and as a part of one common transaction, and all the matters and things so alleged by the said defendant as a defense to the coupons declared on in the plaintiff's

declaration in this case relate equally to and affected the validity in the same way, of the first coupon maturing on each and every of said bonds, to wit: the coupons falling due July 1, 1872.

And the plaintiff says that heretofore, to wit, on the 18th of January, 1873, and to the March term, A D. 1873, of the said Circuit court above mentioned, the said plaintiff caused and procured an action at law to be brought against the said defendant in said court, in the name of Alexander Wallace, upon and for the non-payment of certain interest coupons, due July first, 1872, belonging to the plaintiff, and then held by said Alexander Wallace, which had been detached from certain of the bonds referred to in the plaintiff 's declaration in this case, to wit, bonds number 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, and 60, and other interest coupons from which bonds falling due at a later time, but differing in no other respect from the said coupons falling due July first, 1872, are declared upon in the plaintiff 's declaration in this case. That said defendant appeared by its attorneys and made defense to the merits of said cause, but such proceedings were thereupon had in said court that afterwards, to wit, at the December term, 1874, of said court, and on, to wit, the 29th day of January, 1875, by the consideration and judgment of said court, the said Alexander Wallace, the plaintiff of record in said action (but who was in fact suing as the trustee, which the proof in such case showed, of the plaintiff herein), recovered against the said defendant the full amount of the said interest coupons so sued upon with interest on the same, to wit, the sum of $1,476.30 for damages for the non-payment of said interest coupons so sued upon, whereof the said defendant was convicted, as by the record and proceedings therein will more fully and at large appear.

And the plaintiff further says that such action so brought against the said defendant in the name of Alexander Wallace was an action of trespass on the case on promises, commonly called an action of assumpsit; and in such suit the defendant filed a plea of the general issue, which was duly sworn to, whereby the defendant put in issue the same matters and things set up by the defendant in this case in its said second plea, and which the plaintiff in this replication insists the defendant ought not to be admitted to plead, and the defendant

introduced evidence upon the trial of said case in support of the claim then and there made by it, that said Elias S. Potter was not in law or in fact the supervisor of said town of Oregon when he signed, executed or issued said forty bonds, and that the said bonds had been voted to said Ogle and Carroll County Railroad Company upon the conditions mentioned in the defendant's said amended second plea in this case, yet that the said conditions had not, nor had any of them been complied with by said Ogle and Carroll County Railroad Company, or by the said Chicago and Iowa Railroad Company, or any other company. But that said bonds had been fraudulently and illegally issued by said Potter and said Marsh, or one of them, in the manner alleged in the defendant's said second plea filed in this case.

And that the said Ogle and Carroll County Railroad Company had on the first day of June, 1870, made and entered into articles of consolidation with the said Chicago and Iowa Railroad Company whereby the said two companies agreed to merge, combine and consolidate their respective capital stocks, franchises, grants, immunities, privileges, capacities, properties, rights of way, and all their property, real, personal and mixed, into one company and corporation under the corporate name "the Chicago and Iowa Railroad Company." Yet, notwithstanding such claim and such testimony and proof, all the issues in said case were found against said defendant, and in favor of said Alexander Wallace, and judgment was thereupon rendered upon the said verdict against said defendant, and in favor of said Alexander Wallace, for the amount of the coupons sued upon, which judgment has never been reversed, vacated or superseded, but still remains in force and virtue.

And the plaintiff further says that upon the said trial of said case of Alexander Wallace against the town of Oregon, the presiding judge instructed the jury upon the question of whether said Elias S. Potter was supervisor of said town when he executed and issued said bonds in substance as follows: "They claim" (referring to the claim of the attorneys for said town of Oregon on said trial), "that the appointment of Dr. Potter" (meaning thereby, the said Elias S. Potter) "by the board was unathorized; that is, by a single justice of the peace and town clerk, and that, therefore, it did not amount, as I understand, to an appointment *de*

*facto.* With reference then to the first point made in regard to the appointment of the supervisor, I shall charge you that under the township organization law as it stood in this state at the time this transaction took place, the appointment made and entered upon the books of the town by the town clerk, and the only acting justice of the peace in the town at that time created, or rather invested, the appointee with the powers and duties of the supervisor *de facto*; that on his accepting the appointment and filing his bond and oath of office, be became invested with the duties of the supervisor, and that until he was ousted by judicial process, his acts were binding upon the town as the supervisor of the town, in the same manner as if he had been duly elected; that strangers dealing with the town or in its corporate capacity, finding upon the records the entries in due form of law, showing his appointment, would be entitled to be protected in all dealings with him as the proper officer of the town."

And so the plaintiff says that the question of whether said Potter was the supervisor of said town, when he executed and issued said bonds, and the question of whether said Ogle and Carroll County Railroad Company agreed to or became consolidated with said Chicago and Iowa Railroad Company before said vote and before the issue of said bonds, and the question of whether said bonds had been fraudulently, improperly or illegally issued as averred in said second plea, has passed into final judgment against said town, and in favor of the validity of said bonds and coupons, and is not now open in this suit for further controversy, but has become *res adjudicata.*

And the plaintiff further says that the said bonds made by said town of Oregon in the declaration referred to, and the interest coupons issued with said bonds declared on in said declaration, were, after the same were issued by the said town of Oregon as aforesaid, and before any of said bonds or interest coupons became due or payable, to wit, on the first day of July, 1871, and at, to wit, the said Northern district of Illinois, purchased for a valuable consideration in the usual course of business by one W. N. Coler, who then and there obtained possession thereof, and that afterwards and before any of said bonds or coupons became due or payable, the said Coler

for a valuable consideration then and there received by him from the plaintiff, sold and delivered in the usual course of business, the said bonds and interest coupons last above mentioned (except bonds number 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44 and 45), with all the coupons issued therewith, to the plaintiff, and that said Coler afterwards and before any of said bonds or coupons became due or payable, and on, to wit, the day and year, and at, to wit, the place last mentioned, for a valuable consideration then and there received by him from one Alexander Wallace, sold and delivered in the usual course of business to said Alexander Wallace, the said bonds number 29, 30, 31, 32 and 33, with all the coupons issued therewith, and that said Alexander Wallace afterwards and before any of said bonds or coupons became due or payable, and on, to wit, the day and year, and at, to wit, the place last mentioned, for a valuable consideration then and there received by him from the plaintiff, sold and delivered in the usual course of business the said bonds and interest coupons last described to the plaintiff. That said W. N. Coler, before any of said bonds or coupons became due or payable, on, to wit, the 1st day of March, 1872, at, to wit, the place last mentioned, for a valuable consideration then and there received by him from one William S. Wallace, sold and delivered, in the usual course of business, to said William S. Wallace the said bonds numbered 34, 35, 36 and 37, with all interest coupons issued therewith, and that said William S. Wallace afterwards and before any of said bonds or coupons became due or payable, and on, to wit, the day and year, and at, to wit, the place last mentioned, for a valuable consideration then and there received by him from the plaintiff, sold and delivered, in the usual course of business, the said bonds and interest coupons last described, to the plaintiff.

And the plaintiff says that neither said W. N. Coler, Alexander Wallace, William S. Wallace or the plaintiff, had any knowledge, information or notice at or before the time when they respectively became the purchasers and holders of said bonds and interest coupons as aforesaid, or at or before the time when they respectively paid for the same, as aforesaid, of any defense to said bonds or coupons; or that any condition or conditions upon which such bonds

had been voted by said town had not been complied with before said bonds or coupons were issued; or that said bonds or coupons had been fraudulently, improperly or illegally made, issued or registered by said town or by any of its officers or agents, or by said Elias S. Potter, or said Fred H. Marsh, or by any other person or persons whatsoever, or that said Elias S. Potter was not in law or in fact, the supervisor of said town when he signed, executed or delivered said bonds or coupons, or when he pretended to act as supervisor of said town, or when he signed the records of said town of Oregon as supervisor, or when he made the affidavit and certificate and transmitted the same to the state auditor, for the registration of said bonds; or that the said Ogle and Carroll County Railroad Company, or said Chicago and Iowa Railroad Company had neglected or failed to comply with any of the conditions or stipulations on which said bonds were voted by said town of Oregon, before said bonds were dated or issued; or that said railroad companies had consolidated, or had agreed to consolidate; but on the contrary, said W. N. Coler, Alexander Wallace, William S. Wallace and the plaintiff, and each and every of them purchased for a valuable consideration, and became the legal holder and owner of said bonds and interest coupons so purchased by them respectively as aforesaid, before maturity, in good faith and without any notice whatever of any fraud, irregularity or illegality in the voting for, making, signing or issuing or registering of said bonds or of any want of power or authority on the part of said Elias S. Potter, or said Fred H. Marsh to make, sign or issue said bonds and interest coupons on behalf of said town, or of any want of power or authority on the part of said Elias S. Potter, to make, sign, or swear to or to transmit to the state auditor the certificate filed in the auditor's office of the State of Illinois for the registration of said bonds.

And the plaintiff says that, to procure the registration of said bonds in the auditor's office of the State of Illinois, under the provisions of said act of the legislature of the State of Illinois entitled "an act to fund and provide for paying the railroad debts of counties, "townships, cities and towns," in force April 16, 1869, as set forth in the amended first count of the plaintiff's declaration, the said Elias S. Potter on, to wit, the 4th day of April 1871, at, to wit, said town

of Oregon in said district, and while acting as supervisor of said town of Oregon under color of his said appointment and before the said registration of said bonds, certified under oath in conformity to the provisions of said act last referred to, that all the preliminary conditions required to be done to authorize the registration of said bonds and to entitle them to the benefit of said act had been fully complied with, and that such bonds were entitled to registration under the provisions of said act, and that said bonds were issued by said town of Oregon, under and by authority of the provisions of "an act to amend an act entitled, 'an act to incorporate the Ogle and Carroll "County Railroad Company,'" approved, March 30, 1869, and by a vote of the people of said town, at an election held on the 23d day of June, 1870, which said certificate also contained a statement of the date, amount, number, maturity and rate of interest of such bonds, and was transmitted by said Potter as such supervisor, on, to wit, the said 4th day of April, 1871, and before the said Dwight qualified as, or became supervisor of said town, to the auditor of the State of Illinois, and the same was afterwards, and on the 5th day of June, 1871, filed in, and made a part of the public records in said auditor's office, before the said registration of said bonds.

And the plaintiff avers, that such certificate was not made and said bonds were not in fact executed or issued until after the said Ogle and Carroll Counsy Railroad Company had completed the said first division of said railroad with a "T" rail, weighing not less than forty-five pounds to the yard, in condition to run trains thereon from a connection or intersection with the Chicago and Northwestern Railway to a point at and within said town of Oregon, within one-half mile of the east bank of Rock river, and had equipped the same with rolling stock sufficient to operate a daily train to and from said town, for the accommodation of passengers and freight, nor until after all the conditions specified in said application for and notice of election referred to in said second plea had been fully complied with, except that the railroad was not completed, as aforesaid, until the first day of April, 1871, instead of being completed by the first day of January, 1871, as specified in said application for and notice of election.

And this she, the said plaintiff is ready to verify, wherefore she prays judgment, if the said defendant ought to be admitted or received against the said record and adjudication and matter of estoppel aforesaid, to plead the said plea by him secondly above pleaded.

S. W. PACKARD,
*Plaintiff's Atty.*

SECOND REPLICATION TO AMENDED SECOND PLEA.

And the said plaintiff saith that the said defendant ought not to be admitted or received to plead the said amended plea by it secondly above pleaded, as to so much thereof as alleges that the said Elias S. Potter, who executed and delivered said bonds and coupons referred to or declared upon in the declaration, as supervisor for said defendant, the town of Oregon, was not a supervisor in law or in fact, when he executed and delivered said bonds and coupons, and when he so pretended to be acting as such supervisor, as set forth in said plea; because she says, that said Elias S. Potter, so pretending to act as supervisor of said town of Oregon, and said Fred. H. Marsh, the town clerk of said town, signed, executed and delivered the whole forty thousand dollars of bonds voted by said town, with all the interest coupons attached to such bonds under the same authority, to wit, the act approved March 30, 1869, before referred to, and the vote of the legal voters of the said town taken in pursuance of the provisions of said act on the 23d day of June, 1870, and for the same consideration and at the same time and as a single transaction; and that all of said forty bonds bear the same date and are alike in every respect, except as to date of maturity, which is as stated in the first count of the declaration, and to each bond when issued there were attached certain interest coupons, each for seventy dollars, the first falling due on the first day of July, 1872, and the next on the first day of July, 1873, and another one on the first day of every month of July thereafter, until the maturity of the bond to which such coupon was attached; that such coupons were signed at the same time that the said bonds were signed, by said Potter as such supervisor, and by said Marsh as town clerk, as aforesaid, and as a part of one common transaction, and all the matters and things

so alleged by the said defendant as a defense to the coupons declared on in the plaintiff's declaration in this case relate equally to and affected the validity in the same way, of the first coupon maturing on each and every of said bonds, to wit, the coupons falling due July first, 1872.

And the plaintiff says that heretofore, to wit: on the 18th of January, 1873, and to the March term, A. D. 1873, of the said Circuit court above mentioned, the said plaintiff caused and procured an action at law to be brought against the said defendant in said court in the name of Alexander Wallace, upon and for the non-payment of certain interest coupons due July 1, 1872, belonging to the plaintiff, and then held by said Alexander Wallace, which had been detached from certain of the bonds referred to in the plaintiff 's declaration in this case, to wit: bonds number 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59 and 60, and other interest coupons from which bonds falling due at a later time,but differing in no other respect from the said coupons falling due July 1, 1872, are declared upon in the plaintiff 's declaration in this case. That said defendant was duly served with process and appeared by its attorneys, and made defense to the merits of said cause, but such proceedings were thereupon had in said court that afterwards, to wit: at the December term 1874, of said court and on, to wit: the 29th day of January, 1875, by the consideration and judgment of said court, the said Alexander Wallace, the plaintiff, of record in said action (but who was in fact suing as the trustee--which the proof in such case showed—of the plaintiff herein), recovered against the said defendant the full amount of the said interest coupons so sued upon with interest on the same, to wit: the sum of $1,476.30 for damages for the non-payment of the said interest coupons so sued upon, whereof the said defendant was convicted, as by the record and proceedings therein will more fully and at large appear.

And the plaintiff further says that such action so brought against the said defendant in the name of Alexander Wallace, was an action of trespass on the case on promises, commonly called an action of assumpsit, and in such suit the same matters and things set up by the said defendant in this case in its said second plea, and which the plaintiff in this replication insists the defendant ought not to be admitted or received to plead, were put in issue by the pleadings in said suit

of Alexander Wallace, against the said defendant, and the defendant by its attorneys, was allowed to, and did introduce on the trial of said case tending to prove the same, yet notwithstanding such proof all the issues in said case were found against the defendant, and in favor of said Alexander Wallace, and judgment was rendered thereupon against said defendant, and in favor of said Alexander Wallace, for the amount of the coupons sued upon, and the question of whether the said Elias S. Potter was the *de facto* or the *de jure* supervisor of said town of Oregon when he so executed and delivered said bonds and coupons, thereby passed into final judgment against said defendant, which said judgment still remains in full force and effect, in no wise reversed, suspended or superseded.

And this the said plaintiff is ready to verify, wherefore she prays judgment, if said defendant ought to be admitted or received against the said record and adjudication aforesaid, to plead the said plea by him secondly above pleaded in this suit, that the said Elias S. Potter was not either in law or in fact the supervisor of said town of Oregon when he so executed and delivered said bonds and coupons as aforesaid.

And the said plaintiff, as to the residue of said plea of said defendant, says *precludi non*, because the plaintiff further says that the said bonds made by said town of Oregon, in the declaration referred to, and the interest coupons issued with said bonds declared on in said declaration, were:

[N. B. Here follow the averments contained in the first replication to the second plea, found on pages of this record, as to the plaintiff being an innocent purchaser without notice, and as to the making and transmitting of a certificate for the registration of the bonds in the auditor's office. The replication then proceeds as follows:]

And the plaintiff further says, that the articles of consolidation made and entered into between said Ogle and Carroll County Railroad Company and said original Chicago and Iowa Railroad Company, provided that such articles of consolidation should not go into effect or operation as to that portion of the Ogle and Carroll County Railroad Company between the towns of Rochelle and Oregon, which was the first division of said Ogle and Carroll County Rail-

road Company, until the track of said railroad was laid from said Rochelle (where the same connected or intersected with the Chicago and Northwestern railway) to within one-half mile of Rock river, within the said town of Oregon, and the other conditions were complied with, to enable said Ogle and Carroll County Railroad Company to obtain the said donation bonds from the said town of Oregon.

And the plaintiff says that said articles of consolidation above referred to are the only ones ever entered into by said Ogle and Carroll County Railroad Company, and that the same were not, nor was a copy thereof, ever filed in the office of the secretary of the State of Illinois.

And this the said plaintiff is ready to verify, wherefore she prays judgment, etc.

S. W. PACKARD,
*Plaintiff's Attorney.*

THIRD REPLICATION TO SECOND PLEA.

[This replication is exactly like the second replication to the same plea, with this exception, that in the place of the averment as to what the articles of consolidation contained, this averment is made, viz.:]

And the plaintiff further says that said Ogle and Carroll County Railroad Company did not become merged, combined or consolidated with the Chicago and Iowa Railroad Company, or any other company, before the 24th day of June, 1870; but, on the contrary thereof, the plaintiff says that the consolidation of said Ogle and Carroll County Railroad Company with the original railroad company, called the Chicago and Iowa Railroad Company, took effect, and became operative, after the said town of Oregon had voted said donation of forty thousand dollars in bonds to said Ogle and Carroll County Railroad Company, and after the said 23d day of June, 1870.

And this the plaintiff is ready to verify, wherefore she prays judgment, etc.

S. W. PACKARD,
*Plaintiff's Attorney.*

of Alexander Wallace, against the said defendant, and the defendant by its attorneys, was allowed to, and did introduce on the trial of said case tending to prove the same, yet notwithstanding such proof all the issues in said case were found against the defendant, and in favor of said Alexander Wallace, and judgment was rendered thereupon against said defendant, and in favor of said Alexander Wallace, for the amount of the coupons sued upon, and the question of whether the said Elias S. Potter was the *de facto* or the *de jure* supervisor of said town of Oregon when he so executed and delivered said bonds and coupons, thereby passed into final judgment against said defendant, which said judgment still remains in full force and effect, in no wise reversed, suspended or superseded.

And this the said plaintiff is ready to verify, wherefore she prays judgment, if said defendant ought to be admitted or received against the said record and adjudication aforesaid, to plead the said plea by him secondly above pleaded in this suit, that the said Elias S. Potter was not either in law or in fact the supervisor of said town of Oregon when he so executed and delivered said bonds and coupons as aforesaid.

And the said plaintiff, as to the residue of said plea of said defendant, says *precludi non*, because the plaintiff further says that the said bonds made by said town of Oregon, in the declaration referred to, and the interest coupons issued with said bonds declared on in said declaration, were:

[N. B. Here follow the averments contained in the first replication to the second plea, found on pages of this record, as to the plaintiff being an innocent purchaser without notice, and as to the making and transmitting of a certificate for the registration of the bonds in the auditor's office. The replication then proceeds as follows:]

And the plaintiff further says, that the articles of consolidation made and entered into between said Ogle and Carroll County Railroad Company and said original Chicago and Iowa Railroad Company, provided that such articles of consolidation should not go into effect or operation as to that portion of the Ogle and Carroll County Railroad Company between the towns of Rochelle and Oregon, which was the first division of said Ogle and Carroll County Rail-

road Company, until the track of said railroad was laid from said Rochelle (where the same connected or intersected with the Chicago and Northwestern railway) to within one-half mile of Rock river, within the said town of Oregon, and the other conditions were complied with, to enable said Ogle and Carroll County Railroad Company to obtain the said donation bonds from the said town of Oregon.

And the plaintiff says that said articles of consolidation above referred to are the only ones ever entered into by said Ogle and Carroll County Railroad Company, and that the same were not, nor was a copy thereof, ever filed in the office of the secretary of the State of Illinois.

And this the said plaintiff is ready to verify, wherefore she prays judgment, etc.

S. W. PACKARD,
*Plaintiff's Attorney.*

THIRD REPLICATION TO SECOND PLEA.

[This replication is exactly like the second replication to the same plea, with this exception, that in the place of the averment as to what the articles of consolidation contained, this averment is made, viz.:]

And the plaintifl further says that said Ogle and Carroll County Railroad Company did not become merged, combined or consolidated with the Chicago and Iowa Railroad Company, or any other company, before the 24th day of June, 1870; but, on the contrary thereof, the plaintiff says that the consolidation of said Ogle and Carroll County Railroad Company with the original railroad company, called the Chicago and Iowa Railroad Company, took effect, and became operative, after the said town of Oregon had voted said donation of forty thousand dollars in bonds to said Ogle and Carroll County Railroad Company, and after the said 23d day of June, 1870.

And this the plaintiff is ready to verify, wherefore she prays judgment, etc.

S. W. PACKARD,
*Plaintiff's Attorney.*

of Alexander Wallace, against the said defendant, and the defendant by its attorneys, was allowed to, and did introduce on the trial of said case tending to prove the same, yet notwithstanding such proof all the issues in said case were found against the defendant, and in favor of said Alexander Wallace, and judgment was rendered thereupon against said defendant, and in favor of said Alexander Wallace, for the amount of the coupons sued upon, and the question of whether the said Elias S. Potter was the *de facto* or the *de jure* supervisor of said town of Oregon when he so executed and delivered said bonds and coupons, thereby passed into final judgment against said defendant, which said judgment still remains in full force and effect, in no wise reversed, suspended or superseded.

And this the said plaintiff is ready to verify, wherefore she prays judgment, if said defendant ought to be admitted or received against the said record and adjudication aforesaid, to plead the said plea by him secondly above pleaded in this suit, that the said Elias S. Potter was not either in law or in fact the supervisor of said town of Oregon when he so executed and delivered said bonds and coupons as aforesaid.

And the said plaintiff, as to the residue of said plea of said defendant, says *precludi non*, because the plaintiff further says that the said bonds made by said town of Oregon, in the declaration referred to, and the interest coupons issued with said bonds declared on in said declaration, were:

[N. B. Here follow the averments contained in the first replication to the second plea, found on pages of this record, as to the plaintiff being an innocent purchaser without notice, and as to the making and transmitting of a certificate for the registration of the bonds in the auditor's office. The replication then proceeds as follows:]

And the plaintiff further says, that the articles of consolidation made and entered into between said Ogle and Carroll County Railroad Company and said original Chicago and Iowa Railroad Company, provided that such articles of consolidation should not go into effect or operation as to that portion of the Ogle and Carroll County Railroad Company between the towns of Rochelle and Oregon, which was the first division of said Ogle and Carroll County Rail-

road Company, until the track of said railroad was laid from said Rochelle (where the same connected or intersected with the Chicago and Northwestern railway) to within one-half mile of Rock river, within the said town of Oregon, and the other conditions were complied with, to enable said Ogle and Carroll County Railroad Company to obtain the said donation bonds from the said town of Oregon.

And the plaintiff says that said articles of consolidation above referred to are the only ones ever entered into by said Ogle and Carroll County Railroad Company, and that the same were not, nor was a copy thereof, ever filed in the office of the secretary of the State of Illinois.

And this the said plaintiff is ready to verify, wherefore she prays judgment, etc.

S. W. PACKARD,
*Plaintiff's Attorney.*

THIRD REPLICATION TO SECOND PLEA.

[This replication is exactly like the second replication to the same plea, with this exception, that in the place of the averment as to what the articles of consolidation contained, this averment is made, viz.:]

And the plaintiff further says that said Ogle and Carroll County Railroad Company did not become merged, combined or consolidated with the Chicago and Iowa Railroad Company, or any other company, before the 24th day of June, 1870; but, on the contrary thereof, the plaintiff says that the consolidation of said Ogle and Carroll County Railroad Company with the original railroad company, called the Chicago and Iowa Railroad Company, took effect, and became operative, after the said town of Oregon had voted said donation of forty thousand dollars in bonds to said Ogle and Carroll County Railroad Company, and after the said 23d day of June, 1870.

And this the plaintiff is ready to verify, wherefore she prays judgment, etc.

S. W. PACKARD,
*Plaintiff's Attorney.*

FOURTH REPLICATION TO SECOND PLEA.

And the plaintiff as to so much of the defendant's second plea as alleges that said William Schultz was on the 3d day of April, 1871, a justice of the peace of said town, and that Elias S. Potter was not, when he executed and delivered said bonds and coupons, in law and in fact the supervisor of said town, and was not recognized or treated as such, *precludi non*, because she says, that on, to wit, the 3d day of April, 1871, a vacancy existed in the office of justice of the peace in said town, to which said William Schultz had, the previous year been elected, which could only be filled by election, and which had not been filled when said Elias S. Potter was appointed supervisor, as hereinafter stated.

And the plaintiff further says, that said James H. Cartwright was then the only justice of the peace of said town of Oregon; without this that said William Schultz was then and there a justice of the peace of said town, as alleged in said plea, and that the said Mortimer W. Smith within a day or two after he wrote his said resignation and left the same with the town clerk, as stated in the defendant's said second plea, to wit, on the 5th day of January, 1871, qualified and took his seat as a member of the general assembly of the State of Illinois, to which he had previously been elected, and continued to be a member of said general assembly until after the 5th day of June, 1871, and was absent from said town during all of said time, attending to his duties as such member; that on, to wit, the said 3d day of April, 1871, the resignation of said Mortimer W. Smith, as supervisor of said town of Oregon, was accepted by said James H. Cartwright, he then being the only justice of the peace of said town; and said Elias S. Potter was then and there duly appointed to fill the vacancy which then existed in the office of supervisor of said town, by said James H. Cartwright, justice of the peace of said town, as aforesaid, and Fred H. Marsh, the town clerk of said town (said justice of the peace and town clerk then and there being the only officers of said town comprising the appointing board for said town), and the following record was made upon the town records of said town, and signed by said James H. Cartwright, as such justice of the peace, and by said Fred H. Marsh, as such town clerk, to wit:

"TOWN CLERK'S OFFICE, OREGON, ILLS.

Board of town auditors met for the purpose of filling the vacancy of supervisor caused by the resignation of M. W. Smith. E. S. Potter was appointed to fill vacancy, and the clerk ordered to give the certificate of appointment to the said E. S. Potter.

Witness our hands this 31st day of December, A. D. 1870."

That after the said appointment of said Potter as supervisor was made as aforesaid, said Potter accepted said appointment and duly took and subscribed his oath of office before said Cartwright, as such justice of the peace, and gave bond for the faithful discharge of his duties as required by law, which bond was duly signed by two sureties and approved by the said town clerk and filed in his office; and said Elias S. Potter, when he executed and delivered said bonds and coupons, and made and transmitted to the state auditor the certificate for the registration of said bonds as hereinafter stated, had become, and was the *de facto* and *de jure* supervisor of the said town of Oregon, and was recognized and treated by the other officers of the said town of Oregon, and by the public officers of the said county of Ogle, and by the auditor of the State of Illinois, and by the public, as such supervisor.

And this the said plaintiff is ready to verify, wherefore she prays judgment, etc.

And the plaintiff as to the residue of said amended second plea says *precludi non*, because she says that the said bonds, made by the said town of Oregon, in the declaration referred to, and the interest coupons issued with said bonds declared on in said declaration, were:

[N. B.—Here follow the averments contained in the second replication to the second plea; as to the plaintiff being an innocent purchaser, without notice, and as to Potter, as supervisor, making and transmitting a sworn certificate to the auditor for the registration of the bonds, and as to what the articles of the consolidation contained as to the time when they should go into effect.]

FIFTH REPLICATION TO AMENDED SECOND PLEA.

And the plaintiff as to the second plea of the defendant says, that the said plaintiff, by reason of anything by the said defendant in that plea alleged, ought not to be barred from having and maintaining her aforesaid action thereof against the said defendant, because she says that the defendant, of its own wrong, and without the cause by it in said second plea alleged, broke its said promises in the declaration mentioned, in manner and form as the said plaintiff hath in the said declaration alleged; and this the plaintiff prays may be inquired of by the country, etc.

SIXTH REPLICATION TO THE AMENDED SECOND PLEA.

[N. B.—This replication is exactly like the first replication to the same plea, except that it omits the averments in reference to the plaintiff being an innocent purchaser without notice.]

FIRST REPLICATION TO AMENDED THIRD PLEA.

And the plaintiff saith that the defendant ought not to be admitted or received to plead the said amended plea by it thirdly above pleaded, as to so much thereof wherein it alleges the following, to wit:

"And the defendant further avers, that the said written application for and notice of election in the amended first count of the plaintiff's declaration mentioned, each contained a provision in substance and effect, in the words and figures following:"

"Said bonds not to be issued, dated or delivered until said company shall have completed said first division of said railroad with a T-rail, weighing not less than forty-five pounds to the yard, in condition to run trains thereon from a connection or intersection with the Chicago and Northwestern railway, to a point at and within said town of Oregon, within one-half mile of the east bank of Rock river, and shall have equipped the same with rolling stock sufficient to operate a daily train to and from said town for the accommodation of passengers and freight, nor until said company shall have released town from all liability on account of donation

heretofore voted, except a donation of ten thousand dollars voted by said town on the 9th day of December, A. D. 1869, said vote of forty thousand dollars to be null and void, unless said first division of said railroad shall be completed and equipped as aforesaid, and said company shall execute and deliver said release, then the said bonds to be deliverable upon the demand of said company, and to bear date of the day of delivery."

"And the defendant says that although it may be true that at a special town meeting held in said town on said 23d day of June, 1870, presided over by a moderator, a majority of the votes cast thereat were in favor of the said proposition so submitted to the legal voters of said town, yet the same was not otherwise submitted to said legal voters or voted upon by them; and the defendant avers that there was no election held in said town upon the question of issuing said bonds or making said donation, presided over and held by the judges of election of said town, and that the said supposed election in the amended declaration was not held or presided over by the judges of election of said town."

"And the defendant further avers that said Ogle and Carroll County Railroad Company did not, nor did any one for said company, in anywise comply with the said conditions upon which the said bonds and donation were so voted; and did not complete said first division of said railroad in condition for trains to run thereon from the connection or intersection with the Chicago and Northwestern railway to a point at or within said town of Oregon, within one-half mile of the east bank of Rock river, and equip the same with rolling stock sufficient to operate a daily train to and from said town for the accommodation of passengers and freight on or before the first day of January, A. D. 1871, but wholly failed so to do; whereby the said vote in favor of the issuing of said bonds and making said donation became and was null and void, according to the terms thereof."

"And the defendant avers that said bonds were not issued in compliance with any vote of the people of said town of Oregon, had prior to the adoption of the constitution of the State of Illinois, on the 8th day of August, A. D. 1870, in pursuance of any law providing therefor;" because she says, that Elias S. Potter, the supervisor of

said town of Oregon, and Fred H. Marsh, the town clerk of said town, signed, executed and delivered the whole forty thousand dollars of bonds voted by said town with all the interest coupons attached to such bonds under the same authority, to wit, the act approved March 30, 1869, before referred to, and the vote of the legal voters of said town taken on the 23d day of June, 1870, and for the same consideration and at the same time and as a single transaction, and that all of said forty bonds bear the same date and are alike in every respect except as to date of maturity, which is as stated in the first count of the declaration, and to each bond, when issued, there were attached certain interest coupons, each for seventy dollars, the first falling due on the first day of July, 1872, and the next on the first day of July, 1873, and another one on the first day of every month of July thereafter, until the maturity of the bond to which such coupon was attached; that such coupons were signed at the same time that the said bonds were signed by said Potter, the supervisor of said town, and by said Marsh, the town clerk of said town as aforesaid, and as a part of one common transaction; and all the matters and things so alleged by the said defendant as a defense to the coupons declared on in the plaintiff's declaration in this case relate equally to and affected the validity in the same way of the first coupon maturing on each and every of said bonds, to wit, the coupons falling due July 1, 1872.

And the plaintiff says that heretofore, to wit, on the 18th day of January, 1873, and to the March term, A. D. 1873, of the said Circuit court above mentioned, the said plaintiff caused and procured an action at law to be brought against the said defendant in said court in the name of Alexander Wallace, upon and for the non-payment of certain interest coupons due July 1, 1872, belonging to the plaintiff, and then held by said Alexander Wallace, which had been detached from certain of the bonds referred to in the plaintiff's declation in this case, to wit, bonds number 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59 and 60, and other interest coupons from which bonds falling due at a later time but differing in no other respect from the said coupons falling due July 1, 1873, are declared upon in the plaintiff's declaration in this case: That said defendant appeared by its attorneys and made defense to the merits of said

cause, but such proceedings were thereupon had in said court that afterwards, to wit, at the December term, 1874, of said court, and on, to wit, the 29th day of January, 1875, by the consideration and judgment of said court, the said Alexander Wallace, the plaintiff of record in said action (but who was in fact suing as the trustee—which the proof in such case showed of the plaintiff, herein) recovered against the said defendant the full amount of the said interest coupons so sued upon, with interest on the same, to wit, the sum of $1,476.30, for damages for the non-payment of the said interest coupons so sued upon, whereof the said defendant was convicted, as by the record and proceedings therein will more fully and at large appear.

And the plaintiff further says that such action so brought against the said defendant in the name of Alexander Wallace was an action of trespass on the case on promises, commonly called an action of assumpsit, and in such suit the same matters and things hereinbefore mentioned, set up by the said defendant in this case in its said third plea, and which the plaintiff in this replication insists the defendant ought not to be admitted or received to plead, were put in issue by the pleadings in said suit of Alexander Wallace against the said defendant. And the defendant by its attorneys was allowed to and did introduce evidence on the trial of said case tending to prove the same, yet notwithstanding such proof, all the issues in said case were found against the defendant and in favor of said Alexander Wallace, and judgment was rendered thereupon against said defendant and in favor of said Alexander Wallace for the amount of the coupons sued upon, which said judgment still remains in full force and virtue, in no wise reversed, vacated or superseded.

[N. B. The replication then makes the averments showing the plaintiff to be an innocent purchaser without notice, and concludes with a verification.]

### Second Replication to Amended Third Plea.

And the plaintiff saith that the defendant ought not to be admitted or received to plead the said amended plea by it thirdly above pleaded, as to so much thereof wherein it alleges the following, to wit:

"And the defendant says although it may be true that at a special town meeting held in said town on said 23d day of June, 1870, presided over by a moderator, a majority of the votes cast thereat were in favor of the said proposition so submitted to the legal voters of said town, yet the same was not otherwise submitted to said legal voters or voted upon by them; and the defendant avers that there was no election held in said town upon the question of issuing said bonds or making said donation, presided over and held by the judges of election of said town, and that the said supposed election in the amended declaration was not held or presided over by the judges of election of said town," and also the following, to wit: "and the defendant avers that said bonds were not issued in compliance with any vote of the people of said town of Oregon had prior to the adoption of the constitution of the State of Illinois on the 8th day of August, A. D. 1870, in pursuance of any law providing therefor;" because she says that the supervisor of said town of Oregon and said Fred H. Marsh, the town clerk of said town signed, executed and delivered the whole forty thousand dollars of bonds voted by said town with all the interest coupons attached to such bonds under the same authority, to wit: The act approved March 30, 1869, before referred to, and the vote of the legal voters of said town taken on the 23d day of June, 1870, and for the same consideration and at the same time and as a single transaction, and that all of said forty bonds bear the same date and are alike in every respect, except as to date of maturity, which is as stated in the first count of the declaration, and to each bond when issued, there were attached certain interest coupons, each for seventy dollars, the first falling due on the first day of July, 1872, and the next on the first day of July, 1873, and another one on the first day of every month of July thereafter until the maturity of the bond to which such coupon was attached; that such coupons were signed at the same time that the said bonds were signed by said Potter, the supervisor, and by said Marsh, the town clerk, as aforesaid, and as a part of one common transaction; and all the matters and things so alleged by the said defendant as a defense to the coupons declared on in the plaintiff's declaration in this case, relate equally to and affected the validity in the same way, of the first coupon maturing

on each and every of said bonds, to wit, the coupons falling due July 1, 1872.

And the plaintiff says that heretofore, to wit, on the 18th of January, 1873, and to the March term, A. D. 1873, of the said Circuit court above mentioned, the said plaintiff caused and procured an action at law to be brought against the said defendant in said court in the name of Alexander Wallace upon and for the non-payment of certain interest coupons due July 1, 1872, belonging to the plaintiff and then held by said Alexander Wallace, which had been detached from certain of the bonds referred to in the plaintiff's declaration in this case, to wit, bonds number 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59 and 60, and other interest coupons from which bonds falling due at a later time, but differing in no other respect from the said coupons falling due July 1, 1872, are declared upon in the plaintiff's declaration in this case: That said defendant appeared by its attorneys and made defense to the merits of said cause, but such proceedings were thereupon had in said court, that afterwards, to wit, at the December term, 1874, of said court, and on, to wit, the 29th day of January, 1875, by the consideration and judgment of said court, the said Alexander Wallace, the plaintiff of record in said action (but who was in fact suing as the trustee—which proof in such case showed—of the plaintiff herein) recovered against the said defendant the full amount of the said interest coupons so sued upon, with interest on the same, to wit, the sum of $1,476.30, for damages for the non-payment of said interest coupons so sued upon, whereof the said defendant was convicted, as by the record and proceedings therein will more fully and at large appear.

And the plaintiff further says, that such action so brought against the said defendant in the name of Alexander Wallace, was an action of trespass on the case on promises, commonly called an action of assumpsit; and in such suit the defendant filed a plea of the general issue which was duly sworn to, whereby the defendant put in issue the same matters and things, hereinbefore mentioned, set up by the defendant in this case, in its said amended third plea, and which the plaintiff in this replication insists the defendant ought not to be admitted to plead, and that unimpeached and uncontroverted testimony

and proof was introduced on the trial of said cases upon the issue so made, showing that the only election, or pretended election, ever held at which any of the legal voters of the said town of Oregon ever voted upon the proposition to issue said forty thousand dollars of bonds, or any of them, to said Ogle and Carroll County Railroad Company, was the supposed election held on the 23d day of June, 1870, which the said testimony and proof introduced on said trial showed to have been held and conducted as a special town meeting, and not otherwise, at which one E. J. Rieman acted as moderator, and F. H. Marsh as town clerk, and that at said special town meeting neither the supervisor, assessor nor collector of said town, or any other persons acting as such officers, or otherwise, in any manner acted as judges of election; and that such vote so taken was the only vote of the people of said town of Oregon had at any time, upon the question of issuing said bonds, yet notwithstanding such proof, all the issues in said case were found against the defendant, and in favor of said Alexander Wallace, and judgment was rendered thereupon against said defendant and in favor of said Alexander Wallace for the amount of the coupons sued upon, which judgment has never been reversed, vacated or superseded, but is still in full force and virtue.

And the plaintiff says that the judgment in said Alexander Wallace case would have been in favor of the defendant if the court had not decided that the said election held and conducted as a special town meeting on the said 23d day of June, 1870, was a sufficient compliance with and a pursuance of the provisions of said act referred to in the amended first count, approved March 30, A. D. 1869, as to make said bonds the legal and valid obligations of said town, and so the plaintiff says that the question of the legality of the said vote of the people of said town of Oregon, taken June 23, 1870, in favor of issuing said bonds, has passed into final judgment against said town and in favor of the legal sufficiency of said vote to sustain the validity of said bonds, and is not now open for further controversy, but has become *res adjudicata*.

[N. B. The replication then proceeds to show that the plaintiff is an innocent purchaser, without notice, and concludes with a veri-

fication, after the following averment as to the registration of the bonds:]

And the plaintiff says that to procure the registration of the bonds in the auditor's office of the State of Illinois, under the provisions of said act of the legislature of the State of Illinois, entitled "an act to fund and provide for paying the railroad debts of counties, townships, cities and towns," in force, April 16, 1869, as set forth in the amended first count of the plaintiff's declaration, the supervisor of said town of Oregon, before the said registration of said bonds, certified, under oath, in conformity to the provisions of said act last referred to, that all the preliminary conditions required to be done to authorize the registration of said bonds, and to entitle them to the benefit of said act, had been fully complied with, and that such bonds were entitled to registration under the provisions of said act; and that such bonds were issued by said town of Oregon, under and by authority of the provisions of "an act to amend an act, entitled 'an act to incorporate the Ogle and Carroll County Railroad Company;'" approved March 30, 1869, and by a vote of the people of said town, at an election held on the 23rd day of June, 1870, which said certificate also contained a statement of the date, amount, number, maturity and rate of interest of such bonds, and was transmitted by such supervisor on, to wit: the said 4th day of April, 1871, to the auditor of the State of Illinois, and the same was afterwards and on the 5th day of June, 1871, filed in and made a part of the public records in said auditor's office, before the said registration of said bonds.

And the plaintiff avers that the said certificate for the registration of said bonds, made by the supervisor of said town, referred to in the amended first count, was transmitted to the state auditor, by the supervisor of said town, after the said Ogle and Carroll County Railroad Company had completed the said first division of said railroad with a "T" rail, weighing not less than forty-five pounds to the yard, in condition to run trains thereon from a connection or intersection, with the Chicago and North-Western railway, to a point at and within said town of Oregon, within one half mile of the east bank of Rock river, and had equipped the same with rolling stock sufficient to operate a daily train to and from said town, for the ac-

commodation of passengers and freight; and said bonds were not, in fact, issued nor was said certificate made or transmitted to the state auditor until after all the conditions specified in the said application for and notice of election, referred to in said third plea, had been fully complied with, except that the railroad was not completed, as aforesaid, until the first day of April, 1871, instead of being completed by the first day of January, 1871, as specified in said application for and notice of election.

### Third Replication to Amended Third Plea.

And the plaintiff, as to the amended third plea of the said defendant, says *precludi non*, because she says that said forty bonds and coupons, in the first amended count of the plaintiff's declaration mentioned, were issued in compliance with the vote of the people of said town of Oregon, had prior to the adoption of the constitution of the State of Illinois, on the eighth of August, A. D. 1870, in pursuance of a law providing therefor, although it be true as stated in said plea that said election, held on the 23d day of June, 1870, was conducted as a special town meeting, presided over by a moderator, and that no election was held in said town, upon the question of issuing said bonds or making said donation, presided over and held by the judges of election of said town, and that the said election, held June 23, 1870, in the amended first count of the plaintiff's declaration mentioned, was not held or presided over by the judges of election of said town.

[N. B. The replication then proceeds to show that the plaintiff is an innocent purchaser without notice, and makes the averment as to the registration of the bonds made in the last replication, and concludes with a verification.]

### Fourth Replication to Amended Third Plea.

And the plaintiff as to the third plea of the said defendant says, that the said plaintiff, by reason of anything by the said defendant in that plea alleged, ought not to be barred from having and maintaining her aforesaid action thereof against the said defendant, because she

says that the defendant, of its own wrong, and without the cause by it in the said third plea alleged, broke its said promises in the said declaration mentioned, in manner and form as the said plaintiff hath in the said declaration alleged; and this the plaintiff prays may be inquired of by the country, etc.

S. W. PACKARD,
*Plaintiff's Attorneys.*

### FIFTH REPLICATION TO AMENDED THIRD PLEA.

[N. B. This replication is exactly like the first replication to the same plea, except that it omits the averments as to the plaintiff being an innocent purchaser without notice.]

### FIRST REPLICATION TO AMENDED FOURTH PLEA.

And the said plaintiff saith that the said defendant ought not to be admitted or received to plead the said amended plea by it fourthly above pleaded, as to all or any of the matters or things therein averred; because she says, that said Elias S. Potter, so pretending to act as supervisor of said town of Oregon, and said Fred H. Marsh, the town clerk of said town, as alleged in said plea, signed, executed and delivered the whole forty thousand dollars of bonds voted by said town, with all the interest coupons attached to such bonds, under the same authority, to wit: the act approved March 30, 1869, before referred to, and the vote of the legal voters of said town, taken June 23, 1870, under the provisions of said act as stated in said plea, and upon the same consideration and at the same time, and as a single transaction, and that all of said forty bonds bear the same date and are alike in every respect, except as to date of maturity, which is, as stated in the first count of the plaintiff's declaration, and to each bond when issued there were attached certain interest coupons, each for seventy dollars, the first falling due on the first day of July, 1872, and the next on the first day of July, 1873, and another one on the first day of every month of July thereafter, until the maturity of the bond to which such coupon was attached; that such coupons were signed at the same time that the said bonds

commodation of passengers and freight; and said bonds were not, in fact, issued nor was said certificate made or transmitted to the state auditor until after all the conditions specified in the said application for and notice of election, referred to in said third plea, had been fully complied with, except that the railroad was not completed, as aforesaid, until the first day of April, 1871, instead of being completed by the first day of January, 1871, as specified in said application for and notice of election.

### Third Replication to Amended Third Plea.

And the plaintiff, as to the amended third plea of the said defendant, says *precludi non*, because she says that said forty bonds and coupons, in the first amended count of the plaintiff's declaration mentioned, were issued in compliance with the vote of the people of said town of Oregon, had prior to the adoption of the constitution of the State of Illinois, on the eighth of August, A. D. 1870, in pursuance of a law providing therefor, although it be true as stated in said plea that said election, held on the 23d day of June, 1870, was conducted as a special town meeting, presided over by a moderator, and that no election was held in said town, upon the question of issuing said bonds or making said donation, presided over and held by the judges of election of said town, and that the said election, held June 23, 1870, in the amended first count of the plaintiff's declaration mentioned, was not held or presided over by the judges of election of said town.

[N. B. The replication then proceeds to show that the plaintiff is an innocent purchaser without notice, and makes the averment as to the registration of the bonds made in the last replication, and concludes with a verification.]

### Fourth Replication to Amended Third Plea.

And the plaintiff as to the third plea of the said defendant says, that the said plaintiff, by reason of anything by the said defendant in that plea alleged, ought not to be barred from having and maintaining her aforesaid action thereof against the said defendant, because she

says that the defendant, of its own wrong, and without the cause by it in the said third plea alleged, broke its said promises in the said declaration mentioned, in manner and form as the said plaintiff hath in the said declaration alleged; and this the plaintiff prays may be inquired of by the country, etc.

S. W. PACKARD,
*Plaintiff's Attorneys.*

FIFTH REPLICATION TO AMENDED THIRD PLEA.

[N. B. This replication is exactly like the first replication to the same plea, except that it omits the averments as to the plaintiff being an innocent purchaser without notice.]

FIRST REPLICATION TO AMENDED FOURTH PLEA.

And the said plaintiff saith that the said defendant ought not to be admitted or received to plead the said amended plea by it fourthly above pleaded, as to all or any of the matters or things therein averred; because she says, that said Elias S. Potter, so pretending to act as supervisor of said town of Oregon, and said Fred H. Marsh, the town clerk of said town, as alleged in said plea, signed, executed and delivered the whole forty thousand dollars of bonds voted by said town, with all the interest coupons attached to such bonds, under the same authority, to wit: the act approved March 30, 1869, before referred to, and the vote of the legal voters of said town, taken June 23, 1870, under the provisions of said act as stated in said plea, and upon the same consideration and at the same time, and as a single transaction, and that all of said forty bonds bear the same date and are alike in every respect, except as to date of maturity, which is, as stated in the first count of the plaintiff's declaration, and to each bond when issued there were attached certain interest coupons, each for seventy dollars, the first falling due on the first day of July, 1872, and the next on the first day of July, 1873, and another one on the first day of every month of July thereafter, until the maturity of the bond to which such coupon was attached; that such coupons were signed at the same time that the said bonds

were signed by said Potter, as such supervisor, and by said Marsh, as town clerk as aforesaid, and as a part of one common transaction, and all the matters and things alleged by the said defendant in said amended fourth plea as a defense to the coupons declared on in the plaintiff's declaration in this case, relate equally to and affected the validity in the same way of the first coupon maturing on each and every of said bonds, to wit, the coupons falling due July first, 1872.

And the plaintiff says that heretofore, to wit, on the 18th day of January, 1873, and to the March term, A. D. 1873, of the said Circuit court above mentioned, the said plaintiff caused and procured an action at law to be brought against the said defendant in said court in the name of Alexander Wallace upon and for the non-payment of certain interest coupons, due July 1, 1872, belonging to the plaintiff, and then held by said Alexander Wallace, which had been detached from certain of the bonds referred to in the plaintiff's declaration in this case, to wit, bonds number 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59 and 60, and other interest coupons from which bonds falling due at a later time, but differing in no other respect from the said coupons falling due July 1, 1872, are declared upon in the plaintiff's declaration in this case; that said defendant appeared by its attorneys and made defense to the merits of said cause, but such proceedings were thereupon had in said court, that afterward, to wit, at the December term 1874, of said court, and on to wit, the 29th day of January, 1875, by the consideration and judgment of said court, the said Alexander Wallace, the plaintiff of record in said action (but who was in fact suing as the trustee—which the proof in such cause showed—of the plaintiff herein), recovered against the said defendant, the whole amount of said interest coupons so sued upon with interest on the same, to wit, the sum of $1,476.30 for damages for the non-payment of the said interest coupons so sued upon, whereof the said defendant was convicted, as by the record and proceedings therein will more fully and at large appear.

And the plaintiff further says that such action so brought against the said defendant in the name of Alexander Wallace was an action of trespass on the case on promises, commonly called an action of assumpsit, and in such suit the defendant filed a plea of the

general issue which was duly sworn to, whereby the defendant put in issue the same matters and things set up by the defendant in this case in its said fourth plea, and which the plaintiff in this replication insists the defendant ought not to be admitted to plead, and that uncontroverted testimony and proof was introduced on the trial of said case, upon the issue so made, showing that the only election or pretended election ever held at which any of the voters of said town of Oregon ever voted upon the proposition to issue said forty thousand dollars of bonds or any of them to said Ogle and Carroll County Railroad Company, was the supposed election held on the 23d day of June, 1870, which the said testimony and proof introduced on said trial showed to have been held and conducted as a special town meeting and not otherwise—at which one E. J. Rieman acted as moderator, and F. H. Marsh as town clerk, and that at said special town meeting neither the supervisor, collector nor assessor of said town, or any other persons acting as such officers, or otherwise, in any manner acted as judges of election, and that such vote so taken was the only vote of the people of said town of Oregon had at any time, upon the question of issuing said bonds. And the defendant also introduced evidence upon said trial in support of the claim then and there made by it, that said Elias S. Potter was not in law or in fact the supervisor of said town of Oregon when he signed, executed or issued said forty bonds, and that although the said bonds had been voted at an election conducted as a special town meeting, to said Ogle and Carroll County Railroad Company, upon the conditions mentioned in the defendant's second plea in this case, yet the said conditions had not nor had any of them been complied with by said Ogle and Carroll County Railroad Company, or by the said Chicago and Iowa Railroad Company, or any other company, but that said bonds had been fraudulently and illegally issued by said Marsh and said Potter, or one of them in the manner alleged in the defendant's amended second plea filed in this case, and that the said Ogle and Carroll County Railroad Company had on the first day of June, 1870, made and entered into articles of consolidation with the said Chicago and Iowa Railroad Company, whereby the said two companies agreed to merge, combine and consolidate their respective capital stocks, franchises,

grants, immunities, privileges, capacities, properties, rights of way and all their property real, personal and mixed, into one company and corporation under the corporate name of "The Chicago and Iowa Railroad Company," yet notwithstanding such claim and such testimony and proof, all the issues in said case were found against the defendant and in favor of said Alexander Wallace, and judgment was rendered thereupon against said defendant and in favor of said Alexander Wallace for the amount of the coupons sued upon, which judgment has never been reversed, vacated or superseded, but still remains in full force and virtue.

And the plaintiff says that the judgment in the said Alexander Wallace case would have been in favor of the defendant if the court had not held that the said election, held and conducted as a special town meeting on the said 23d day of June, 1870, was a sufficient compliance with and a pursuance of the provisions of said act referred to in the amended first count, approved March 30, 1869, as to make said bonds the legal and valid obligations of said town, although they were issued as railroad aid bonds after the 2d day of July, 1870, and after the adoption of the present constitution of the State of Illinois.

And the plaintiff further says that upon the said trial of said case of said Alexander Wallace against the town of Oregon, the presiding judge instructed the jury upon the question of whether said Elias S. Potter was supervisor of said town when he executed and issued said bonds, in substance as follows: "They claim," (referring to the claim of the attorneys of the said town of Oregon on said trial) "that the appointmeat of Dr. Potter" (meaning thereby the said Elias S. Potter) "by the board was unauthorized, that is by a single justice of the peace and town clerk, and that therefore it did not amount, as I understand, to even an appointment *de facto*. With reference, then, to the first point made in regard to the appointment of the supervisor, I shall charge you that, under the township organization law as it stood in this state at the time this transaction took place, the appointment made and entered upon the books of the town by the town clerk, and the only acting justice of the peace in the town at that time, created, or rather invested, the appointee with the powers and duties of the supervisor *de facto*. That on his ac-

cepting the appointment and filing his bond and oath of office, he became invested with the duties of the supervisor, and that until he was ousted by judicial process his acts were binding upon the town as the supervisor of the town, in the same manner as if he had been duly elected. That strangers dealing with the town, or in its corporate capacity, finding upon the records the entries in due form of law showing his appointment, would be entitled to be protected in all dealings with him, as the proper officer of the town."

And so the plaintiff says that the question of the legality of the said vote of the people of said town of Oregon, taken June 23, 1870, in favor of issuing said bonds, and the question whether said Potter was the supervisor of said town when he executed and issued said bonds, and the question of whether the said Ogle and Carroll County Railroad Company agreed to or became consolidated with said Chicago and Iowa Railroad Company before said vote, and before the issue of said bonds has passed into final judgment against said town and in favor of the validity of said bonds and coupons, and is not now open in this suit for future controversy, but has become *res adjudicata*.

And the plaintiff further says, that the said bonds made by said town of Oregon in the declaration referred to, and the interest coupons issued with said bonds declared on in said declaration, were, after the same were issued by said town of Oregon as aforesaid, and before any of the said bonds or interest coupons became due or payable, to wit, on the 1st day of July, 1871, and at, to wit, said Northern district of Illinois, purchased for a valuable consideration in the usual course of business by one W. N. Coler, who then and there obtained possession thereof, and that afterwards, and before any of said bonds or coupons became due or payable, and on, to wit, the day and year, and at, to wit, the place last mentioned, the said Coler, for a valuable consideration, then and there received by him from the plaintiff, sold and delivered, in the usual course of business, the said bonds and interest coupons last above mentioned (except bonds number 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44 and 45), with all the coupons issued therewith, to the plaintiff, and that said Coler afterwards, and before any of said coupons became due or payable, and

on, to wit, the day and year and at, to wit, the place last mentioned, for a valuable consideration, then and there received by him from one Alexander Wallace, sold and delivered in the usual course of business, to said Alexander Wallace the said bonds number 29, 30, 31, 32 and 33, with all the coupons issued therewith; and that said Alexander Wallace afterwards and before any of said bonds or coupons became due or payable, and on, to wit, the day and year and at, to wit, the place last mentioned, for a valuable consideration then and there received by him from the plaintiff, sold and delivered in the usual course of business the said bonds and interest coupons last described to the plaintiff; that said W. N. Coler before any of said bonds or coupons became due or payable on, to wit, the first day of March, 1872, at, to wit, the said place last mentioned, for a valuable consideration then and there received by him from one William S. Wallace, sold and delivered in the usual course of business to said William S. Wallace the said bonds numbered 34, 35, 36 and 37, with all interest coupons issued therewith, and that said William S. Wallace afterwards and before any of said bonds or coupons became due or payable, and on, to wit, the day and year and at, to wit, the place last mentioned, for a valuable consideration then and there received by him from the plaintiff, sold and delivered in the usual course of business the said bonds and interest coupons last described to the plaintiff.

And the plaintiff says that neither said W. N. Coler, Alexander Wallace, William S. Wallace, or the plaintiff, had any knowledge, information or notice at or before the time when they respectively became the purchasers and holders of said bonds and interest coupons as aforesaid or at or before the time when they respectively paid for the same as aforesaid, of any defense to said bonds or coupons; or that any condition or conditions upon which said bonds had been voted by said town had not been complied with before said bonds or coupons were issued; or that said bonds or coupons had been fraudulently, improperly or illegally made, issued or registered by said town or by any of its officers or agents or by said Elias S. Potter or said Fred. H. Marsh or by any other person or persons whatsoever, or that said Elias S. Potter was not in law or in fact the supervisor of said town when he signed, executed or delivered said

bonds and coupons, or when he pretended to act as supervisor of said town, or when he signed the records of said town of Oregon as supervisor, or when he made the affidavit and certificate and transmitted the same to the state auditor, for the registration of said bonds; or that the said Ogle and Carroll County Railroad Company or said Chicago and Iowa Railroad Company had neglected or failed to comply with any of the conditions or stipulations on which said bonds were voted by said town of Oregon before said bonds were dated or issued; or that said railroad companies had become consolidated, or had agreed to become consolidated; or that at the election held in said town of Oregon on the 23d day of June, A. D. 1870, the supervisor, assessor and collector of said town of Oregon, or that either of them did not act as judges of such election or that the said election at which said donation of $40,000 in bonds was voted to said Ogle and Carroll County Railroad Company, was conducted as a special town meeting, or that said E. J. Rieman acted as moderator, or that said F. H. Marsh acted as town clerk, or that there was any informality, irregularity or want of strict conformity to all the requirements of the law in respect to the voting for said bonds, but on the contrary, said W. N. Coler, Alexander Wallace, William S. Wallace and the plaintiff, and each and every of them purchased for a valuable consideration and became the legal holder and owner of said bonds and interest coupons so purchased by them respectively as aforesaid before maturity in good faith in the usual course of business, and without any notice whatever of any fraud, irregularity or illegality in the election or voting for or making, signing, issuing or registering of said bonds, or of any want of power or authority on the part of said Elias S. Potter or said Fred. H. Marsh to make, sign or issue said bonds and interest coupons on behalf of said town.

And this the said plaintiff is ready to verify, wherefore she prays judgment, whether the said defendant ought to be admitted or received to plead the said plea by it fourthly above pleaded against the said record and adjudication and matter of estoppel aforesaid, as to any of the matters or things therein averred.

S. W. PACKARD, *Plaintiff's Attorney.*

SECOND REPLICATION TO AMENDED FOURTH PLEA.

And the said plaintiff saith that the said defendant ought not to be admitted or received to plead the said amended plea by it fourthly above pleaded, as to so much thereof as alleges that the said Elias S. Potter, who executed and delivered said bonds and coupons referred to or declared upon in the declaration, as supervisor for said defendant, the town of Oregon, was not a supervisor in law or in fact, when he executed and delivered said bonds and coupons, and when he so pretended to be acting as such supervisor, as set forth in said plea; because, she says, that said Elias S. Potter so pretended to act as supervisor of said town of Oregon, and said Fred. H. Marsh, the town clerk of said town, signed, executed and delivered the whole forty thousand dollars of bonds voted by said town, with all the interest coupons attached to such bonds under the same authority, to wit, the act approved March 30, 1869, before referred to, and the vote of the legal voters of said town of Oregon, taken on the 23d day of June, 1870, under the provisions of said act and for the same consideration and at the same time and as a single transaction, and that all of said forty bonds bear the same date and are alike in every respect except as to date of maturity, which is as stated in the first count of the declaration, and to each bond when issued there were attached certain interest coupons, each for seventy dollars, the first falling due on the first day of July, 1872, and the next on the first day of July, 1873, and another one on the first day of every month of July thereafter until the maturity of the bond to which such coupon was attached; that such coupons were signed by said Potter as such supervisor, and by said Marsh as town clerk, as aforesaid, and as part of one common transaction, and all the matters and things so alleged by the said defendant as a defense to the coupons declared on in the plaintiff's declaration in this case relate equally to and affected the validity in the same way of the first coupon maturing on each and every of said bonds, to wit, the coupons falling due July first, 1872.

And the plaintiff says that heretofore, to wit: on the 18th of January, 1873, and to the March term, A. D. 1873, of the said Circuit court above mentioned, the said plaintiff caused and procured an

action at law to be brought against the said defendant in said court, in the name of Alexander Wallace, upon and for the non-payment of certain interest coupons, due July 1, 1872, belonging to the plaintiff, and then held by said Alexander Wallace, which had been detached from certain of the bonds referred to in the plaintiff's declaration in this case, to wit: bonds number 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59 and 60, and other interest coupons, from which bonds falling due at a later time, but differing in no other respect from the said coupons falling due July 1, 1872, are declared upon in the plaintiff's declaration in this case; that said defendant was duly served with process and appeared by its attorneys and made defense to the merits of said cause; but such proceedings were thereupon had in said court, that afterwards, to wit: at the December term, 1874, of said court and on, to wit: the 29th day of January, 1875, by the consideration and judgment of said court, the said Alexander Wallace, the plaintiff of record in said action, but who was, in fact, suing as the trustee, which the proof in such case showed, of the plaintiff herein, recovered against the said defendant the full amount of the said interest coupons so sued upon with interest on the same, to wit: the sum of $1,476.30 for damages for the non-payment of the said interest coupons so sued upon, whereof the said defendant was convicted, as by the record and proceedings therein will more fully and at large appear.

And the plaintiff further says that such action so brought against the said defendant in the name of Alexander Wallace, was an action of trespass on the case on promises, commonly called an action of assumpsit, and in such suit the same matters and things set up by the said defendant in this case, in its said amended second plea, and which the plaintiff in this replication insists the defendant ought not to be admitted or received to plead, were put in issue by the pleadings in said suit of Alexander Wallace against the said defendant, and the defendant by its attorneys was allowed to and did introduce on the trial of said case evidence tending to prove the same, yet notwithstanding such proof all the issues in said case were found against the defendant and in favor of said Alexander Wallace, and judgment was rendered thereupon against said defendant and in favor of said Alexander Wallace for the amount of the coupons sued upon; and the question

of whether the said Elias S. Potter was the *de facto* or the *de jure* supervisor of the said town of Oregon, when he so executed and delivered said bonds and coupons thereby passed into final judgment against said defendant, and in favor of the validity of said bonds and coupons, which said judgment still remains in full force and effect, in no wise reversed, suspended or superseded.

And this the said plaintiff is ready to verify, wherefore she prays judgment if the said defendant ought to be admitted or received against the said record and adjudication aforesaid to plead the said plea by him fourthly above pleaded in this suit; that the said Elias S. Potter was not, either in law or in fact, the supervisor of said town of Oregon, when he so executed and delivered said bonds and coupons as aforesaid. And the said plaintiff as to the residue of said fourth amended plea of said defendant says *precludi non*, because the plaintiff further says that the said bonds made by said town of Oregon, in the declaration referred to, and the interest coupons issued with said bonds declared on in said declaration, were:

[N. B.— The replication then proceeds to state the facts, showing the plaintiff to be an innocent purchaser without notice as in the first replication to the fourth plea, and then continues as follows:] ⋕

And the plaintiff says that to procure the registration of the bonds in the auditor's office of the State of Illinois, under the provisions of said act of the legislature of the State of Illinois, entitled "an act to fund and provide for paying the railroad debts of counties, townships, cities and towns," in force, April 16, 1869, as set forth in the amended first count of the plaintiff's declaration, the said Elias S. Potter on, to wit: the 4th day of April, 1871, at, to wit: said town of Oregon in said district, and while acting as supervisor of said town of Oregon, under color of his said appointment and before the said registration of said bonds, certified under oath in conformity to the provisions of said act last referred to, that all the preliminary conditions required to be done to authorize the registration of said bonds, and to entitle them to the benefit of said act, had been fully complied with, and that such bonds were entitled to registration under the provisions of said act; and that such bonds were issued by said town of Oregon under and by authority of the provisions of "an act to amend an act entitled 'an act to incorporate the Ogle

and Carroll County Railroad Company;'" approved March 30, 1869, and by a vote of the people of said town, at an election held on the 23d day of June, 1870, which said certificate also contained a statement of the date, amount, number, maturity and rate of interest of such bonds, and was transmitted by said Potter as such supervisor on, to wit: the said 4th day of April, 1871, and before the said Dwight qualified as or became supervisor of said town, to the auditor of the State of Illinois, and the same was afterwards and on the 5th day of June, 1871, filed in and made a part of the public records in said auditor's office, before the said registration of said bonds.

And the plaintiff avers, that such certificate was not made, and said bonds were not in fact executed or issued until after the said Ogle and Carroll County Railroad Company had completed the said first division of said railroad with a "T" rail weighing not less than forty-five pounds to the yard, in condition to run trains thereon from a connection or intersection with the Chicago and Northwestern railway to a point at and within said town of Oregon within one-half mile of the east bank of Rock river, and had equipped the same with rolling stock sufficient to operate a daily train to

of whether the said Elias S. Potter was the *de facto* or the *de jure* supervisor of the said town of Oregon, when he so executed and delivered said bonds and coupons thereby passed into final judgment against said defendant, and in favor of the validity of said bonds and coupons, which said judgment still remains in full force and effect, in no wise reversed, suspended or superseded.

And this the said plaintiff is ready to verify, wherefore she prays judgment if the said defendant ought to be admitted or received against the said record and adjudication aforesaid to plead the said plea by him fourthly above pleaded in this suit; that the said Elias S. Potter was not, either in law or in fact, the supervisor of said town of Oregon, when he so executed and delivered said bonds and coupons as aforesaid. And the said plaintiff as to the residue of said fourth amended plea of said defendant says *precludi non*, because the plaintiff further says that the said bonds made by said town of Oregon, in the declaration referred to, and the interest coupons issued with said bonds declared on in said declaration, were:

[N. B.— The replication then proceeds to state the facts, showing the plaintiff to be an innocent purchaser without notice as in the first replication to the fourth plea, and then continues as follows:] #

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# And the plaintiff says that it is not true, as averred by said defendant in its said amended fourth plea, that on the 24th day of June, 1870, when said vote was taken for said bonds and said special town meeting held as stated in said last mentioned plea, that there was no law in force in any manner authorizing a vote to be taken in said town of Oregon upon the question as to whether the said town should issue such bonds and coupons and make such donation to said Ogle and Carroll County Railroad Company, or that the said vote so taken at such special town meeting was without authority of law; but, on the contrary thereof, the plaintiff says that said act, entitled "An act to amend an act entitled 'An act to incorporate the Ogle and Carroll County Railroad Company,'" approved March 30, 1869, referred to under the amended first count of the plaintiff's declaration, was then in full force and virtue, and fully authorized the said vote to be taken.

and Carroll County Railroad Company;'" approved March 30, 1869, and by a vote of the people of said town, at an election held on the 23d day of June, 1870, which said certificate also contained a statement of the date, amount, number, maturity and rate of interest of such bonds, and was transmitted by said Potter as such supervisor on, to wit: the said 4th day of April, 1871, and before the said Dwight qualified as or became supervisor of said town, to the auditor of the State of Illinois, and the same was afterwards and on the 5th day of June, 1871, filed in and made a part of the public records in said auditor's office, before the said registration of said bonds.

And the plaintiff avers, that such certificate was not made, and said bonds were not in fact executed or issued until after the said Ogle and Carroll County Railroad Company had completed the said first division of said railroad with a "T" rail weighing not less than forty-five pounds to the yard, in condition to run trains thereon from a connection or intersection with the Chicago and Northwestern railway to a point at and within said town of Oregon within one-half mile of the east bank of Rock river, and had equipped the same with rolling stock sufficient to operate a daily train to and from said town, for the accommodation of passengers and freight, nor until all the conditions specified in said notice of election referred to in the amended first count had been fully complied with, except that the railroad was not completed, as aforesaid, until the first day of April, 1871, instead of being completed by the first day of January, 1871, as specified in said notice.

And the plaintiff further says that said Ogle and Carroll County Railroad Company did not become merged, combined or consolidated with the Chicago and Iowa Railroad Company, or any other company before the 24th day of June, 1870; but on the contrary thereof, the plaintiff says that the consolidation of said Ogle and Carroll County Railroad Company, with the original railroad company, called the Chicago and Iowa Railroad Company, took effect and became operative after the said town of Oregon had voted said donation of forty thousand dollars, in bonds, to said Ogle and Carroll County Railroad Company, and after the 23d

day of June, 1870. And this the plaintiff is ready to verify, wherefore she prays judgment, &c.

S. W. PACKARD,
*Plaintiff's Attorney.*

THIRD REPLICATION TO AMENDED FOURTH PLEA.

And the plaintiff, as to so much of the defendant's amended fourth plea, as alleges that said William Schultz was, on the third day of April, 1871, a justice of the peace of said town, and that Elias S. Potter was not, when he executed and delivered said bonds and coupons, in law or in fact, the supervisor of said town, and was not recognized or treated as such, *precludi non*, because she says that, on to wit, the third day of April, 1871, a vacancy existed in the office of justice of the peace in said town, to which said William Schultz had the previous year been elected, which could only be filled by election and which had not been filled when said Elias S. Potter was appointed supervisor as hereinafter stated.

And the plaintiff further says that said James H. Cartwright was then the only justice of the peace of said town of Oregon, without this, that said William Schultz was then and there a justice of the peace of said town; and that the said Mortimer W. Smith, within a day or two after he wrote his said resignation and left the same with the town clerk of said town, as stated in the defendant's amended second plea, to wit, on the fifth day of January, 1871, qualified and took his seat as a member of the general assembly of the State of Illinois, to which he had previously beenelected, and continued to be a member of said general assembly until after the fifth day of June, 1871, and was absent from said town, during all of said time, attending to his duties as such member; that on, to wit, the said third day of April, 1871, the resignation of said Mortimer W. Smith, as supervisor of said town of Oregon, was accepted by said James H. Cartwright, he then being the only justice of the peace of said town, and said Elias S. Potter was then and there duly appointed to fill the vacancy which then existed in the office of supervisor of said town, by said James H. Cartwright, justice of the peace of said town, as aforesaid, and Fred H. Marsh, the town clerk of

said town (said justice of the peace and town clerk then and there being the only officers of said town comprising the appointing board for said town), and the following record was made upon the town records of said town and signed by said James H. Cartwright, as justice of the peace, and by said Fred H. Marsh, as such town clerk, to wit:

"TOWN CLERK'S OFFICE, OREGON, Ill.

"Board of town auditors met for the purpose of filling the vacancy of supervisor, caused by the resignation of M. W. Smith. E. S. Potter was appointed to fill vacancy, and the clerk ordered to give the certificate of appointment to the said E. S. Potter.

"Witness our hands this 31st day of December, A. D. 1870."

That after the said appointment of said E. S. Potter, as supervisor, was made as aforesaid, said Potter accepted said appointment and duly took and subscribed his oath of office before said Cartwright as such justice of the peace, and gave bond for the faithful discharge of his duties as required by law, which bond was duly signed by two sureties, and approved by the said town clerk and filed in his office, and said Elias S. Potter, when he executed and delivered said bond and coupons, and made and transmitted to the state auditor, the certificate for the registration of said bonds as hereinafter stated, had become and was the *de facto* and *de jure* supervisor of the said town of Oregon, and was recognized and treated by the other officers of said town of Oregon, and by the public officers of the said county of Ogle, and by the auditor of the State of Illinois, and by the public as such supervisor.

And this the said plaintiff is ready to verify, wherefore she prays judgment, &c.

And the plaintiff as to the residue of said fourth plea says, *precludi non*, because she says, that the said bonds made by the said town of Oregon in the declaration referred to, and the interest coupons issued with said bonds, declared on in said declaration were:

[N. B. The replication then proceeds to show that the plaintiff is an innocent purchaser, without notice, as in the first replication to the fourth plea, and then continues as follows:]

And the plaintiff says that it is not true, as averred by said defendant in its said fourth plea, that on the 23d day of June, 1870, when said vote was taken for said bonds, and said special town meeting held, as stated in said last mentioned plea, that there was no law in force in any manner authorizing a vote to be taken in said town of Oregon upon the question as to whether the said town should issue such bonds and coupons and make such donation to said Ogle and Carroll County Railroad Company, or that the said vote so taken at such special town meeting was without authority of law; but on the contrary thereof the plaintiff says that said act entitled "an act to amend an act entitled 'an act to incorporate the Ogle and Carroll County Railroad Company'" approved March 30, 1869, referred to in the amended first count of the plaintiff's declaration, was then in full force and virtue, and fully authorized the said vote to be taken.

And the plaintiff further says that said Ogle and Carroll County Railroad Company did not become merged, combined or consolidated with the Chicago and Iowa Railroad Company, or any other company, before the 24th day of June, 1870, but on the contrary thereof the plaintiff says that the consolidation of said Ogle and Carroll County Railroad Company with the original railroad company, called the Chicago and Iowa Railroad Company, took effect after the said town of Oregon had voted and issued said donation of forty thousand dollars in bonds to said Ogle and Carroll County Railroad Company and after the 23rd day of June, 1871.

And the plaintiff says that to procure the registration of said bonds in the auditor's office of the State of Illinois, under the provisions of said act of the legislature of the State of Illinois, entitled "an act to fund and provide for paying the railroad debts of counties, townships, cities and towns," in force April 16, 1869, as set forth in the amended first count of the plaintiff's declaration, the said Elias S. Potter on, to wit, the 4th day of April, 1871, at, to wit, said town of Oregon in said district, and while acting as supervisor of said town of Oregon under color of his said appointment and before the said registration of said bonds, certified under oath in conformity to the provisions of said act last referred to that all the preliminary conditions required to be done to authorize the registration

of said bonds and to entitle them to the benefit of said act, had been fully complied with, and that such bonds were entitled to registration under the provisions of said act, and that such bonds were issued by said town of Oregon under and by authority of the provisions of "an act to amend an act entitled 'an act to incorporate the Ogle and Carroll County Railroad Company,'" approved March 30, 1869, and by a vote of the people of said town at an election held on the 23d day of June, 1870, which said certificate also contained a statement of the date, amount, number, maturity and rate of interest of such bonds, and was transmitted by said Potter as such supervisor on, to wit, the said 4th day of April, 1871, and before the said Dwight qualified as, or became supervisor of said town, to the auditor of the State of Illinois, and the same was afterwards and on the 5th day of June, 1871, filed in and made a part of the public records in said auditor's office before said registration of said bonds.

And the plaintiff avers that such certificate was not made, and said bonds were not in fact executed or issued until after the said Ogle and Carroll county railroad company had completed the said first division of said railroad with a "T." rail, weighing not less than forty-five pounds to the yard, in condition to run trains thereon from a connection or intersection with the Chicago and Northwestern railway, to a point at and within said town of Oregon, within one half mile of the east bank of Rock River, and had equipped the same with rolling stock sufficient to operate a daily train to and from said town, for the accommodation of passengers and freight, nor until after all the conditions specified in said notice of election referred to in the amended first count had been fully complied with, except that the railroad was not completed, as aforesaid, until the first day of April, 1871, instead of being completed by the first day of January, 1871, as specified in said notice.

And this said plaintiff is ready to verify, wherefore she prays judgment, etc.

S. W. PACKARD,
*Plaintiff's Attorney.*

FOURTH REPLICATION TO AMENDED FOURTH PLEA.

And the plaintiff as to the fourth plea of the defendant says, that the plaintiff by reason of anything by the said defendant in that plea alleged ought not to be barred from having and maintaining her aforesaid action thereof against the said defendant, because she says, that the defendant of its own wrong, and without the cause by it in the said third plea alleged, broke its said promises in the said declaration mentioned in manner and form, as the said plaintiff hath in the said declaration alleged; and this the plaintiff prays may be enquired of by the country, etc.

S. W. PACKARD,
*Plaintiff's Attorney.*

FIFTH REPLICATION TO AMENDED FOURTH PLEA.

[N. B. This replication is exactly like the first replication to the same plea, except that it omits the averment as to the plaintiff being an innocent purchaser, without notice.]

## Demurrer to Replications.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS. } ss.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR SAID NORTHERN DISTRICT.

Eliza Jennings
*v.*
The Town of Oregon. } *Assumpsit.*

And now comes the defendant, by Edsall & Edsall, its attorneys, and as to the first, second, third, fourth and sixth replications of the plaintiff to the amended second plea of the defendant, and also as to the first, second, third and fifth replications of the plaintiff to the amended third plea of the defendant, and also as to the first, second, third and fifth replications of the plaintiff to the amended fourth plea of the defendant; and as to each and every of said replications to

said pleas, severally, the defendant says that, by reason of anything in said replications, or either of them, respectively contained, the plaintiff ought not to maintain her action, etc., because it says that said replications, and each of them, and the matters and things therein contained, in manner and form as the same are therein respectively alleged and replied, is and are not sufficient in law to enable the plaintiff to maintain her said action, etc., and this the defendant is ready to verify, wherefore it prays judgment as to each of said several replications, etc., etc.

And for cause of demurrer to said several replications and each of them, the defendant assigns and shows to the court here the following:

1. That the said replications do not, nor does either of them, which purports to set up the verdict and judgment in said supposed former suit, wherein Alexander Wallace was plaintiff, as an estoppel, etc., state or set forth the pleadings in said former suit, in such manner as to enable this court to determine what matters of fact were put in issue by such pleadings in said former suit; nor does either of said replications state or set forth the proceedings on the trial and the verdict found by the jury in such former suit, so as to enable this court to determine what precise question of fact was actually submitted to, passed upon, and found by the jury in such verdict.

2. It does not appear from said replications, or either of them, by a proper averment of facts, that the matters of defense set up in the said defendant's amended second, third and fourth pleas respectively, and to which said replications respectively purport to be an answer, were pleaded in said former suit, in such manner that the matters therein contained were directly put in issue by the pleadings in said former suit, nor that such defenses were actually set up and insisted upon at the trial in said former suit.

3. It does not appear by a proper averment of facts in said replications, or either of them, that the proceedings upon, and evidence offered at, the trial of said former suit, were such as made it necessary that the jury, in their verdict should, and in fact did, pass upon and find against the defendant, the said matters of fact in respect to which it is claimed in said several replications respectively, that the defendant is estopped, etc.

4. Said replications do not, nor does either of them, meet and answer the gist and substance of the plea to which the same are respectively replied, but, on the contrary thereof, seek to raise immaterial issues; and also set up, at great length, superfluous and irrelevant matter.

5. And the said first, second and third replications, and each of them, to the second amended plea, and also the first and second replications to the amended third plea, and each of them, and also the first and second replications to the amended fourth plea, and each of them, are double in this: that in and by each of said replications the plaintiff seeks to set up and rely upon two distinct matters of estoppel, viz.: First, the verdict and judgment in said former suit; and second, the recitals alleged to have been contained in the bonds referred to and the certificate of Potter, as supervisor, upon which it is alleged the bonds were registered in the office of the auditor of public accounts; and also in respect to the averment showing that the plaintiff purchased the bonds and coupons for value before maturity, and without notice, etc., etc.

6. It does not appear from the said replications, or either of them, that Elias S. Potter was the supervisor of said town, when he made his supposed certificate, upon which the said bonds were registered.

7. And the said replications, and each of them, are otherwise insufficient and defective in substance.

EDSALL & EDSALL,
*Attorneys for Defendant.*

Endorsed.
Filed May 16, 1884.
W. H. BRADLEY, *Clerk.*

Record Page.

On the same day, to wit: on the sixteenth day of May, in the
73 adjourned May term of said court, 1884, in the record of the proceedings thereof in said entitled cause before Hon. John M. Harlan, one of the justices of the Supreme court, is the following entry, to wit:

ORDER.

Eliza Jennings
*vs.*
The Town of Oregon. } *Assumpsit.*

Now come the parties by their attorneys, and now comes on to be heard the demurrer of the defendant to the first, second, third, fourth and sixth replications to the amended second plea filed herein, and the demurrer of the defendant to the first, second, third and fifth replications to the amended third and fourth pleas filed herein, and after hearing a part of the arguments of counsel upon said demurrer the further hearing is postponed to a future day.

Afterwards, to wit: on the second day of July, in the ad-
74 journed May term of said court, 1884, in the record of the proceeding thereof in said entitled cause, the following order is now entered of record by direction of Hon. John M. Harlan, one of the justices of the Supreme court, to wit:

ORDER.

Eliza Jennings
*vs.*
The Town of Oregon. } ..

This case having been heretofore argued and submitted upon defendant's demurrer to the first, second, third, fourth and sixth replications to the amended second plea, to the first, second, third and fifth replications to the amended third plea, and to the first, second, third and fifth replications to the amended fourth plea, which demurrer was filed on the sixteenth day of May last, and the court being advised as to the law arising upon said demurrer, it is adjudged that the same be overruled, with liberty, however, to the defendant upon the final trial of the case to raise by motion or in other proper form, the same questions that are presented by said demurrer.

The question of costs on said demurrer is reserved until the final disposition of the case in this court.

Afterwards, to wit, on the twenty-sixth day of January, 1885,
75 came the defendant, by its attorneys, and filed in said clerk's office its general rejoinder to all of the replications of the plaintiff in said entitled cause, which said general rejoinder is in the words and figures following, to wit:

GENERAL REJOINDER.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS. }

IN THE CIRCUIT OF THE UNITED STATES IN AND FOR SAID DISTRICT. DECEMBER TERM, 1884.

Eliza Jennings
*vs.*
Town of Oregon.

And now comes the defendant, by Edsall & Edsall, its attorneys, and as to all of the replications of the plaintiff to the amended second, third and fourth pleas of the defendant, says *actio non*, because it says that said replications to said pleas are untrue, and the defendant denies the allegations therein contained, and of this the defendant puts itself upon the country, etc.

EDSALL & EDSALL, *Attys. for Deft.*

Endorsed: Filed Jany. 26, 1885. W. H. BRADLEY, *Clerk.*

Afterwards, to wit, on the seventh day of November, in the
76 adjourned October term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Romanzo Bunn, district judge, is the following entry, to wit:

ORDER.

Eliza Jennings
*vs.*
The Town of Oregon. } *Assumpsit.*

Now come the parties by their attorneys, and upon issues joined herein, thereupon comes a jury of good and lawful men, to wit: A. W. Bucher, Charles B. Reynolds, C. G. Pettibone, Winfield S. Cowen, F. M. Sinnett, Samuel Cutler, Charles A. Wall, A. W. Cochran, L. Rander, John Sullivan, Orange Daniels and Daniel Taylor, who were also duly elected, tried and sworn well and truly to try said issues, and, after hearing the opening statements of the counsel, the hour of adjournment having arrived, the further trial of the cause is postponed until Monday morning next.

Afterwards, to wit: on the ninth day of November, in the
77 adjourned October term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. ROMANZO BUNN, district judge, is the following entry, to wit:

ORDER.

Eliza Jennings
*vs.*
The Town of Oregon. } *Assumpsit.*

Now come again the parties by their attorneys, and now comes also the jury in this behalf empaneled and sworn, and after hearing

a part of the evidence, the hour of adjournment having arrived, it is ordered that the further trial of this cause be postponed until to-morrow morning.

Afterwards, to wit: on the tenth day of November, in the adjourned October term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. ROMANZO BUNN, district judge, is the following entry, to wit:

ORDER.

Eliza Jennings
*vs.*
The Town of Oregon. } *Assumpsit.*

Now come again the parties by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing the concluding evidence and a part of the arguments of the counsel, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning.

78 Afterwards, to wit: on the eleventh day of November, in the adjourned October term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. ROMANZO BUNN, district judge, is the following entry, to wit:

ORDER.

Eliza Jennings
*vs.*
The Town of Oregon. } *Assumpsit.*

Now come again the parties by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing the concluding arguments of the counsel, the jury under the instruction of the court, return the following verdict, to wit: "We, the jury, find the issues for the plaintiff, and assess her damages at twenty thousand eight hundred twenty-three dollars and sixty-eight cents.

And thereupon the defendant, by its attorney, moves the court for a new trial herein.

79 Afterwards, to wit, on the twenty-fourth day of November, in the adjourned October term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Romanzo Bunn, district judge, is the following entry, to wit:

ORDER.

Eliza Jennings
*vs.*
The Town of Oregon. } *Assumpsit.*

Now, come again the parties, by their respective attorneys, and now comes on to be heard the motion of the defendant heretofore

entered herein for a new trial of this cause, and after hearing the arguments of the counsel for the plaintiff and defendant, the court not being now fully advised upon said motion, take the same under advisement.

On the same day, to wit, on the twenty-fourth day of November, in the adjourned October term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Romanzo Bunn, district judge, is the following entry, to wit:

JUDGMENT.

Eliza Jennings
*vs.*
The Town of Oregon. } *Assumpsit.*

The court having considered and being now fully advised
80 upon the motion of the defendant for a new trial herein, overrules the same and awards judgment. It is thereupon considered and adjudged by the court that the plaintiff do have and recover of the defendant the said sum of twenty thousand eight hundred and twenty-three dollars and sixty-eight cents, her damages, together with her costs in this behalf, amounting to dollars and cents.

On the hearing of said cause the following exceptions were
81 taken and were allowed by the court and made of record, which said exceptions are in the words and figures following, to wit:

BILL OF EXCEPTIONS.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS. }

IN THE CIRCUIT COURT OF THE UNITED STATES FOR SAID NORTHERN DISTRICT.

Eliza Jennings
*vs.*
The Town of Oregon. }

Be it remembered that on the trial of the above cause upon the issues and in pursuance of the stipulation of the counsel for the parties dated January 24, 1885, and filed herein January 26, 1885, in these words.

82 UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS. } ss.

IN THE CIRCUIT COURT OF THE UNITED STATES IN AND FOR SAID DISTRICT.

Eliza Jennings,
*vs.*
The Town of Oregon. }

It is hereby stipulated and agreed that in order to close up the issues in this case, so that the same may be tried upon the merits,

the defendant may file one general rejoinder, traversing or deny
all the replications of the plaintiff to the special pleas of the defe
ant, and that under the issues so formed the respective parties s
be at liberty to introduce upon the trial any legal and compe
evidence to establish the plaintiff's cause or causes of action on
side, and the defense or defenses of the defendant upon the ot
side, without regard to the formality of the pleadings.

Dated, Chicago, January 24, 1885.

S. W. PACKARD, *Atty. for Plaintif*
EDSALL & EDSALL, *Attys. for Def*

Endorsed: Filed January 26, 1885. WM. H. BRADLEY, *Cl*

And that, to wit, on the 7th, 9th, 10th and 11th day
83 November, 1885, before his Honor Judge Bunn, holding
Circuit court of the United States for the Northern district
Illinois, the following evidence was introduced on said trial,
subject to objection for incompetency and irrelevancy.

On the part of the plaintiff as follows: An act to incorporate
Ogle and Carroll County Railroad Company, approved Febru
18, 1857, and found in the private laws of Illinois for 1857 at pa
1230 to 1234 inclusive.

An act to amend "an act entitled an act to incorporate the O
and Carroll County Railroad Company," approved February
1859, found on pages 488 and 489 of the private laws of Illinoi
1859.

An act to amend an act entitled "an act to incorporate the O
and Carroll County Railroad Company," approved March 30, 18
and found in volume 3, of private laws of Illinois of 1869, at pa
324, 325 and 326, to which, by agreement of parties, re
ence is had with like force and effect as if copied herein at leng
the material portions of which are copied into the first count of
declaration.

Also a certified transcript from the register of bonds, volume
in the auditor's office of the State of Illinois, showing the re
84 tration of bonds numbered from 21 to 60 inclusive, of $1,
each, dated December 31, 1870. To which counsel
defendant then and there objected, upon the ground that the sa
was incompetent and irrelevant, which objection the court ov
ruled, to which ruling the defendant then and there excepted,
the same was read in evidence in the words and figures followi
to wit:

entered herein for a new trial of this cause, and after hearing the arguments of the counsel for the plaintiff and defendant, the court not being now fully advised upon said motion, take the same under advisement.

On the same day, to wit, on the twenty-fourth day of November, in the adjourned October term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Romanzo Bunn, district judge, is the following entry, to wit:

JUDGMENT.

Eliza Jennings
*vs.*
The Town of Oregon. } *Assumpsit.*

The court having considered and being now fully advised
80 upon the motion of the defendant for a new trial herein, overrules the same and awards judgment. It is thereupon considered and adjudged by the court that the plaintiff do have and recover of the defendant the said sum of twenty thousand eight hundred and twenty-three dollars and sixty-eight cents, her damages, together with her costs in this behalf, amounting to dollars and cents.

On the hearing of said cause the following exceptions were
81 taken and were allowed by the court and made of record, which said exceptions are in the words and figures following, to wit:

BILL OF EXCEPTIONS.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS. }

IN THE CIRCUIT COURT OF THE UNITED STATES FOR SAID NORTHERN DISTRICT.

Eliza Jennings
*vs.*
The Town of Oregon. }

Be it remembered that on the trial of the above cause upon the issues and in pursuance of the stipulation of the counsel for the parties dated January 24, 1885, and filed herein January 26, 1885, in these words.

82 UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS. } ss.

IN THE CIRCUIT COURT OF THE UNITED STATES IN AND FOR SAID DISTRICT.

Eliza Jennings,
*vs.*
The Town of Oregon. }

It is hereby stipulated and agreed that in order to close up the issues in this case, so that the same may be tried upon the merits,

the defendant may file one general rejoinder, traversing or denying all the replications of the plaintiff to the special pleas of the defendant, and that under the issues so formed the respective parties shall be at liberty to introduce upon the trial any legal and competent evidence to establish the plaintiff's cause or causes of action on one side, and the defense or defenses of the defendant upon the other side, without regard to the formality of the pleadings.

Dated, Chicago, January 24, 1885.

S. W. PACKARD, *Atty. for Plaintiff.*
EDSALL & EDSALL, *Attys. for Deft.*

Endorsed: Filed January 26, 1885. WM. H. BRADLEY, *Clerk.*

And that, to wit, on the 7th, 9th, 10th and 11th days of
83 November, 1885, before his Honor Judge Bunn, holding said Circuit court of the United States for the Northern district of Illinois, the following evidence was introduced on said trial, all subject to objection for incompetency and irrelevancy.

On the part of the plaintiff as follows: An act to incorporate the Ogle and Carroll County Railroad Company, approved February 18, 1857, and found in the private laws of Illinois for 1857 at pages 1230 to 1234 inclusive.

An act to amend "an act entitled an act to incorporate the Ogle and Carroll County Railroad Company," approved February 24, 1859, found on pages 488 and 489 of the private laws of Illinois of 1859.

An act to amend an act entitled "an act to incorporate the Ogle and Carroll County Railroad Company," approved March 30, 1869, and found in volume 3, of private laws of Illinois of 1869, at pages 324, 325 and 326, to which, by agreement of parties, reference is had with like force and effect as if copied herein at length, the material portions of which are copied into the first count of the declaration.

Also a certified transcript from the register of bonds, volume D,
in the auditor's office of the State of Illinois, showing the regis-
84 tration of bonds numbered from 21 to 60 inclusive, of $1,000 each, dated December 31, 1870. To which counsel for defendant then and there objected, upon the ground that the same was incompetent and irrelevant, which objection the court overruled, to which ruling the defendant then and there excepted, and the same was read in evidence in the words and figures following, to wit:

| Where Payable. | Rate of Interest. | By Whom Signed. | | By Whom Presented. | To Whom Payable. | Railroad Aided. | Date of vote authorizing Debt. | Date of approval of law authorizing vote and issue of Bonds. | Index to Laws. | | | | Amount of Bonds Registered. | REMARKS. Each coupon $70.00 1st due July 1, 1872 on ea. Bond. |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | Law. | Year. | Vol. | Page. | | |
| ew York | 7 | Elias S. Potter, Supr. | Fred. H. Marsh, T. C. | W. H. Miller. | R. R. Co. or Bearer. | Ogle & Carroll Co. | 1870 June 23 | 1869 Mch. 30 | Private | 1869 | | 324 | 10...$1,000 | |
| do | " | do | do | do | " " | do | " " | " " | " | " | | " | 10... 1,000 | |
| do | " | do | do | do | " " | do | " " | " " | " | " | | " | 10... 1,000 | |
| do | " | do | do | do | " " | do | " " | " " | " | " | | " | 10... 1,000 | |
| do | " | do | do | do | " " | do | " " | " " | " | " | | " | 11... 1,000 | |
| do | " | do | do | do | " " | do | " " | " " | " | " | | " | 11... 1,000 | |
| do | " | do | do | do | " " | do | " " | " " | " | " | | " | 11... 1,000 | |
| do | " | do | do | do | " " | do | " " | " " | " | " | | " | 11... 1,000 | |
| do | " | do | do | do | " " | do | " " | " " | " | " | | " | 12... 1,000 | |
| do | " | do | do | do | " " | do | " " | " " | " | " | | " | 12... 1,000 | |
| do | " | do | do | do | " " | do | " " | " " | " | " | | " | 12... 1,000 | |
| do | " | do | do | do | " " | do | " " | " " | " | " | | " | 12... 1,000 | |
| do | " | do | do | do | " " | do | " " | " " | " | " | | " | 13... 1,000 | |
| do | " | do | do | do | " " | do | " " | " " | " | " | | " | 13... 1,000 | |
| do | " | do | do | do | " " | do | " " | " " | " | " | | " | 13... 1.000 | |
| do | " | do | do | do | " " | do | " " | " " | " | " | | " | 13... 1,000 | |
| do | " | do | do | do | " " | do | " " | " " | " | " | | " | 14... 1,000 | |
| do | " | do | do | do | " " | do | " " | " " | " | " | | " | 14... 1,000 | |
| do | " | do | do | do | " " | do | " " | " " | " | " | | " | 14... 1,000 | |
| do | " | do | do | do | " " | do | " " | " " | " | " | | " | 14.. 1,000 | |
| do | " | do | do | do | " " | do | " " | " " | " | " | | " | 15... 1,000 | |
| do | " | do | do | do | " " | do | " " | " " | " | " | | " | 15... 1,000 | |
| do | " | do | do | do | " " | do | " " | " " | " | " | | " | 15... 1,000 | |
| do | " | do | do | do | " " | do | " " | " " | " | " | | " | 15... 1,000 | |
| do | " | do | do | do | " " | do | " " | " " | " | " | | " | 16... 1,000 | |
| do | " | do | do | do | " " | do | " " | " " | " | " | | " | 16... 1,000 | |
| do | " | do | do | do | " " | do | " " | " " | " | " | | " | 16... 1,000 | |
| do | " | do | do | do | " " | do | " " | " " | " | " | | " | 16... 1,000 | |
| do | " | do | do | do | " " | do | " " | " " | " | " | | " | 17... 1,000 | |
| do | " | do | do | do | " " | do | " " | " " | " | " | | " | 17... 1,000 | |
| do | " | do | do | do | " " | do | " " | " " | " | " | | " | 17... 1,000 | |
| do | " | do | do | do | " " | do | " " | " " | " | " | | " | 17... 1,000 | |
| do | " | do | do | do | " " | do | " " | " " | " | " | | " | 18... 1,000 | |
| do | " | do | do | do | " " | do | " " | " " | " | " | | " | 18... 1,000 | |
| do | " | do | do | do | " " | do | " " | " " | " | " | | " | 18... 1,000 | |
| do | " | do | do | do | " " | do | " " | " " | " | " | | " | 18... 1,000 | |
| do | " | do | do | do | " " | do | " " | " " | " | " | | " | 19... 1,000 | |
| do | " | do | do | do | " " | do | " " | " " | " | " | | " | 19... 1,000 | |
| do | " | do | do | do | " " | do | " " | " " | " | " | | " | 19... 1,000 | |
| do | " | do | do | do | " " | do | " " | " " | " | " | | " | 19... 1,000 | |

SPRINGFIELD, March 15th, 1884.

ccounts of the State of Illinois, do hereby certify that the foregoing is a true, full and correct transcript from "Register of Bonds, Vol. D," (showing regis-
Co., to the Ogle & Carroll Co. Railroad Co.) now on file in and forming part of the records of this office.
y name and affix the seal of my office at Springfield the day and year first above written.

CHAS. P. SWIGERT,
*Auditor of Public Accounts.*

76

## No. 2.

*Register of Officers Elected in the County of Ogle for the year 1871.*

| Names of Officers. | Residence. | Office. | When Elected. | Date of Bond and Qualification. | Names of Securities. | Date of Commission. | Expiration of Commission. | Remarks. |
|---|---|---|---|---|---|---|---|---|
| *Oregon.* | | | | | | | | |
| George M. Dwight.. | Oregon | Supervisor..... | April 4, 1871 | | | | | |
| Fred. H. Marsh..... | " | Town Clerk..... | " " " | | | | | |
| Michael Nohe..... | " | Assessor..... | " " " | | | | | |
| Joseph F. Hawthorne | " | Collector..... | " " " | | | | | |
| Solomon J. Eshback. | " | Com. of Highways.. | " " " | | | | | |
| John Rutledge..... | " | Justice of the Peace. | " " " | April 8, 187 | Thos. Rutledge.. S. J. Eshback & Isaac Wing. | April 15, 1871. | April, 1874. | To fill vacancy caused by resignation of Wm. Schultz. |
| For Poor Farm..... | 195 | | | | | | | |
| Against Poor Farm.. | 11 | | | | | | | |

STATE OF ILLINOIS, } ss.
OGLE COUNTY. }

I, Henry P. Lason, county clerk in and for said county and state, do hereby certify that by virtue of my said office I am the legal custodian of the files and records of said county appertaining to said office; I further certify that the above is a true, perfect and complete copy of an entry in a book now in my office remaining, entitled "Register of Officers B. Ogle County," as the same appears on page 91 of said book.

In witness whereof I have hereunto set my hand and the seal of said county at my office in Oregon, Ills., this 23d day of January, A. D. 1885.

[SEAL.]

HENRY P. LASON, *County Clerk.*

Plaintiff also offered in evidence a certified copy of page 91, from the book entitled "Register of Officers B, Ogle County," for the year 1871, to which counsel for defendant objected on the ground that the same was incompetent and irrelevant; the court overruled the said objection, to which the defendant then and there excepted, and the same was read in evidence as follows, in the words and figures following, to wit:

| Date registered. | No. of Bonds registered. | Date of Bonds. | When Payable. Principal. | When Payable. Interest. | Where Payable. | Rate of Interest. | By Whom Signed. | | By Whom Presented. | To Whom Payable. | Railroad Aided. | Date of vote authorizing Debt. |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1871 June 5 | 21 | 1870 Dec. 31 | 1881 July 1 | July 1 annually | New York | 7 | Elias S. Potter, Supr. | Fred. H. Marsh, T. C. | W. H. Miller. | R. R. Co. or Bearer. | Ogle & Carroll Co. | 1870 June |
| " " " | 22 | " " " | " " | " " | do | " | do | do | do | " " | do | " " |
| " " " | 23 | " " " | " " | " " | do | " | do | do | do | " " | do | " " |
| " " " | 24 | " " " | " " | " " | do | " | do | do | do | " " | do | " " |
| " " " | 25 | " " " | 1882 " | " " | do | " | do | do | do | " " | do | " " |
| " " " | 26 | " " " | " " | " " | do | " | do | do | do | " " | do | " " |
| " " " | 27 | " " " | " " | " " | do | " | do | do | do | " " | do | " " |
| " " " | 28 | " " " | " " | " " | do | " | do | do | do | " " | do | " " |
| " " " | 29 | " " " | 1883 " | " " | do | " | do | do | do | " " | do | " " |
| " " " | 30 | " " " | " " | " " | do | " | do | do | do | " " | do | " " |
| " " " | 31 | " " " | " " | " " | do | " | do | do | do | " " | do | " " |
| " " " | 32 | " " " | " " | " " | do | " | do | do | do | " " | do | " " |
| " " " | 33 | " " " | 1884 " | " " | do | " | do | do | do | " " | do | " " |
| " " " | 34 | " " " | " " | " " | do | " | do | do | do | " " | do | " " |
| " " " | 35 | " " " | " " | " " | do | " | do | do | do | " " | do | " " |
| " " " | 36 | " " " | " " | " " | do | " | do | do | do | " " | do | " " |
| " " " | 37 | " " " | 1885 " | " " | do | " | do | do | do | " " | do | " " |
| " " " | 38 | " " " | " " | " " | do | " | do | do | do | " " | do | " " |
| " " " | 39 | " " " | " " | " " | do | " | do | do | do | " " | do | " " |
| " " " | 40 | " " " | " " | " " | do | " | do | do | do | " " | do | " " |
| " " " | 41 | " " " | 1886 " | " " | do | " | do | do | do | " " | do | " " |
| " " " | 42 | " " " | " " | " " | do | " | do | do | do | " " | do | " " |
| " " " | 43 | " " " | " " | " " | do | " | do | do | do | " " | do | " " |
| " " " | 44 | " " " | " " | " " | do | " | do | do | do | " " | do | " " |
| " " " | 45 | " " " | 1887 " | " " | do | " | do | do | do | " " | do | " " |
| " " " | 46 | " " " | " " | " " | do | " | do | do | do | " " | do | " " |
| " " " | 47 | " " " | " " | " " | do | " | do | do | do | " " | do | " " |
| " " " | 48 | " " " | " " | " " | do | " | do | do | do | " " | do | " " |
| " " " | 49 | " " " | 1888 " | " " | do | " | do | do | do | " " | do | " " |
| " " " | 50 | " " " | " " | " " | do | " | do | do | do | " " | do | " " |
| " " " | 51 | " " " | " " | " " | do | " | do | do | do | " " | do | " " |
| " " " | 52 | " " " | " " | " " | do | " | do | do | do | " " | do | " " |
| " " " | 53 | " " " | 1889 " | " " | do | " | do | do | do | " " | do | " " |
| " " " | 54 | " " " | " " | " " | do | " | do | do | do | " " | do | " " |
| " " " | 55 | " " " | " " | " " | do | " | do | do | do | " " | do | " " |
| " " " | 56 | " " " | " " | " " | do | " | do | do | do | " " | do | " " |
| " " " | 57 | " " " | 1890 " | " " | do | " | do | do | do | " " | do | " " |
| " " " | 58 | " " " | " " | " " | do | " | do | do | do | " " | do | " " |
| " " " | 59 | " " " | " " | " " | do | " | do | do | do | " " | do | " " |
| " " " | 60 | " " " | " " | " " | do | " | do | do | do | " " | do | " " |

AUDITOR'S OFFICE, ILLINOIS.

I, CHARLES P. SWIGERT, Auditor of Public Accounts of the State of Illinois, do hereby certify that the foregoing is a true, full and correct transcr
tration of bonds issued by Oregon Township, Ogle Co., to the Ogle & Carroll Co. Railroad Co.) now on file in and forming part of the records of this offi

In testimony whereof, I hereunto subscribe my name and affix the seal of my office at Springfield the day and year first above written.

[SEAL.]

Plaintiff also introduced a certified copy of page 75 of the same book, to which the defendant objected on the same grounds, which objections the court overruled, and the defendant then and there excepted to such ruling, and the same was read in evidence in the words and figures following, to wit:



## No. 3.

*Register of Officers elected in the County of Ogle for the year 1870.*

| Names of Officers. | Residence. | Office. | When Elected. | Date of Bond and Qualification. | Names of Securities. | Date of Commission. | Expiration of Commission. | Remarks. |
|---|---|---|---|---|---|---|---|---|
| *Oregon Town Officers.* | | | | | | | | |
| Mortimer W. Smith. | Oregon | Supervisor | Aprl. 5, 1870 | | | | | Resigned. |
| Frede'ck H. Marsh.. | " | Town Clerk | " " " | | | | | |
| Michael Nohe..... | " | Assessor | " " " | | | | | |
| George W. Snyder... | " | Collector | " " " | | | | | |
| Orvis Wilson..... | " | Com. Highways | " " " | | | | | |
| James H. Cartwright | " | Justice of the Peace. | " " " | April 9, 1870 | George P. Jacobs | April 18, 1870. | | |
| Wm. Schultz..... | " | " " " | " " " | | E. M. Light and | " 18, " | | Resigned Mch. 2, 1871 |
| Richard Donovan... | " | Constable..... | " " " | | Wm. W. Bennett | | | |
| John F. Bull..... | " | " ..... | " " " | | | | | |
| Elias S. Potter..... | " | Supervisor | Appointed December 31, 1870. | | | | | Appointed Dec. 31st, 1870, to fill vacancy caused by resignation of Mortimer W. Smith. |
| For poor farm, 200. Against, | | | | | | | | |

STATE OF ILLINOIS, } ss.
OGLE COUNTY. }

I, Henry P. Lason, county clerk and clerk of the County court, in and for said county, in the State aforesaid, do hereby certify that by virtue of my office I have the custody and keeping of all the records and papers of said office. I further certify the above and foregoing to be a true, perfect and complete copy, copied from a book found in my office, entitled, "Register of Officers 'B,' Ogle County," as the same appears to me from said book. But I further certify that I find no authority providing for the keeping of a register of any town officers other than constables and justices of the peace, and that I do not regard said book as anything more than a blotter kept from hearsay evidence, as a mere matter of convenience to the county clerk, and not as a record, at least so far as my entry is made therein, in reference to any town officer not a justice of the peace or constable, and that a separate register, since about 1873, has been kept for notaries, justices and constables, in the office.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Oregon, this 20th day of March, 1884.

[SEAL.]

HENRY P. LASON, *County Clerk.*
By FRANK REED, *Deputy.*

Plaintiff also introduced in evidence twenty-four bonds num-
90 bered from 29 to 37 inclusive, and 46 to 60 inclusive, each for $1,000, all dated December 31st, 1870, and alike in every respect, except as to number and date of maturity; said bonds numbered 29, 30, 31 and 32 falling due, July 1st, 1883.

Said bonds numbered 33, 34, 35 and 36, falling due July 1st, 1884, and said bond numbered 37 falling due July 1st, 1885. Said bonds numbered 49, 50, 51 and 52, falling due July 1st, 1888; said bonds numbered 53, 54, 55 and 56 falling due July 1st, 1889; said bonds numbered 57, 58, 59 and 60 falling due July 1st, 1890.

The following is a copy of said bond numbered 29 with the certificate of the auditor upon the same. A similar certificate was likewise upon each of the other bonds.

UNITED STATES OF AMERICA.

No. 29. *State of Illinois, County of Ogle.* $1,000.

OREGON TOWN BOND.

Know all men by these presents, that the Town of Oregon in the County of Ogle, and State of Illinois, is indebted to the Ogle and Carroll County Railway Company, in the full and just sum of
91 one thousand dollars, which sum of money said town agrees and promises to pay on or before the first day of July, 1883, to the said Ogle and Carroll County Railroad Company, or bearer with interest at the rate of seven per cent. per annum payable annually on the first day of July at the office of the Farmers' Loan and Trust Company of New York, in the City of New York, upon the delivery of the coupons severally hereto annexed, for which payment of principal and interest, well and truly to be made the faith, credit and property of said town of Oregon are hereby solemnly pledged under authority of an act of the General Assembly of the State of Illinois, entitled "An act to amend an act entitled an act to incorporate the Ogle and Carroll County Railroad Company," which said act was approved March 30, 1869.

This bond is one of a series numbering from 21 to 60 inclusive for $1,000 each, which bonds, so numbered, together with another series numbered from 1 to 20 inclusive for $500 each, are the only bonds issued by said town of Oregon under and by virtue of said act.

In witness whereof, the supervisor and town clerk of the said town of Oregon have hereunto set their hands this thirty-first day of December, A. D. 1870.

E. S. POTTER, *Supervisor.*

FRED. H. MARSH, *Town Clerk.*

92 (Copy of auditor's certificate on back of bond.)

AUDITOR'S OFFICE, Illinois,
SPRINGFIELD, June 5, 1871.

I, Charles E. Lippincott, auditor of public accounts of the State of Illinois, do hereby certify that the within bond has been registered in this office this day, pursuant to the provisions of act entitled "An act to fund and provide for paying the railroad debts of counties, townships, cities and towns," in force April 16, 1869.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of my office the day and year aforesaid.

[SEAL.] C. E. LIPPINCOTT, *Auditor P. A.*

The date on the bonds, viz: "Thirty-first day of December, A. D. 1870, is lithographed the same as the body of the bonds."

Before said bonds and coupons were offered in evidence, coun-
93 sel for defendant objected to the same being read in evidence upon, the grounds that E. S. Potter, who signed said bonds and coupons as supervisor, was not the supervisor of said Town of Oregon, and had no authority to sign said bonds and coupons as such supervisor; and that such bonds were issued without authority of law and in violation of the constitution of the State of Illinois, and are not the bonds or obligations of said Town of Oregon, which objection the court overruled, and permitted said bonds and coupons to be read in evidence in manner aforesaid, to which the defendant then and there excepted. Plaintiff also introduced in evidence 193 coupons, each for $70, and each signed by E. S. Potter, supervisor, and F. H. Marsh, clerk. To which the defendant objected on the same grounds, the court overruled said objection. To which the defendant then and there excepted, and the same were read in evidence as hereinafter stated. The following are the coupons for interest upon bond numbered 29, due on the 1st day of July, 1873, July 1st, 1874, July 1st, 1875, July 1st, 1876, July 1st, 1877, July 1st, 1878, July 1st, 1879 and July 1st, 1880, respectively.

(*Copy of Coupons.*)

94 State of Illinois, County of Ogle. The Town of Oregon will pay to the Ogle and Carroll County Railroad Company, or bearer, Seventy Dollars at the office of the Farmers Loan & Trust Company of New York in the City of New York on the first day of July, 1874, on presentation, being one year's interest on bond No. 29. E. S. POTTER, *Supervisor.*

F. H. MARSH, *Clerk.*

State of Illinois, County of Ogle. The Town of Oregon will pay to the Ogle and Carroll County Railroad Company, or bearer, Seventy Dollars at the office of the Farmers Loan & Trust Company of New York in the City of New York on the first day of July, 1873, on presentation, being one year's interest on bond No. 29.

F. H. MARSH, *Clerk.* E. S. POTTER, *Supervisor.*

(*Copy of Coupons.*)

95 State of Illinois, County of Ogle. The Town of Oregon will pay to the Ogle and Carroll County Railroad Company, or bearer, Seventy Dollars at the office of the Farmers Loan & Trust Company of New York in the City of New York on the first day of July, 1877, on presentation, being one year's interest on bond No. 29. E. S. POTTER, *Supervisor.*
F. H. MARSH, *Clerk.*

State of Illinois, County of Ogle. The Town of Oregon will pay to the Ogle and Carroll County Railroad Company, or bearer, Seventy Dollars at the office of the Farmers Loan & Trust Company of New York in the City of New York on the first day of July, 1876, on presentation, being one year's interest on bond No. 29.
F. H. MARSH, *Clerk.* E. S. POTTER, *Supervisor.*

State of Illinois, County of Ogle. The Town of Oregon will pay to the Ogle and Carroll County Railroad Company, or bearer, Seventy Dollars at the office of the Farmers Loan & Trust Company of New York in the City of New York on the first day of July, 1875, on presentation, being one year's interest on bond No. 29.
F. H. MARSH, *Clerk.* E. S. POTTER, *Supervisor.*

(*Copy of Coupons.*)

96 State of Illinois, County of Ogle. The Town of Oregon will pay to the Ogle and Carroll County Railroad Company, or bearer, Seventy Dollars at the office of the Farmers Loan & Trust Company of New York in the City of New York on the first day of July, 1880, on presentation, being one year's interest on bond No. 29. E. S. POTTER, *Supervisor.*
F. H. MARSH, *Clerk.*

State of Illinois, County of Ogle. The Town of Oregon will pay to the Ogle and Carroll County Railroad Company, or bearer, Seventy Dollars at the office of the Farmers Loan & Trust Company of New York in the City of New York on the first day of July, 1879, on presentation, being one year's interest on bond No. 29.
F. H. MARSH, *Clerk.* E. S. POTTER, *Supervisor.*

State of Illinois, County of Ogle. The Town of Oregon will pay to the Ogle and Carroll County Railroad Company, or bearer, Seventy Dollars at the office of the Farmers Loan & Trust Company of New York in the City of New York on the first day of July, 188 on presentation, being one year's interest on bond No.
F. H. MARSH, *Clerk.* E. S. POTTER, *Supervisor.*

The other coupons were like the foregoing, except that they
97 represented interest due on the balance of the twenty-three bonds before referred to and falling due upon July 1st, 1873, to July 1st, 1880, inclusive, and one interest coupon on bond numbered 46, falling due July 1st, 1872. In every other respect the coupons were alike.

The plaintiff also introduced in evidence a stipulation, dated Chicago, April 28th, 1884, signed by S. W. Packard, attorney for plaintiff, and Edsall, Hawley & Edsall, attorneys for defendant, and a further stipulation thereto appended, dated May 2d, 1884, together with the testimony taken in the case of Wallace *vs.* Town of Oregon, and exhibits therein referred to, viz: Exhibit A, and also exhibits lettered from "I to P," inclusive, stating at the same time that the plaintiff introduced the evidence given on the former trial of the case of Alexander Wallace against the Town of Oregon, for the purpose of showing what the evidence was in that case in support of the claim that the matters in controversy were *res adjudicata*, not intending thereby to waive the benefit of the estoppel which the plaintiff claimed against the defendant, owing to the recitals in the bond and the records made by the officers of the town and the auditor of state.

The following are said stipulations and testimony in the
98 Wallace case, and exhibits and records and documents referred to in said stipulation:

99 UNITED STATES OF AMERICA, }
NORTHERN DISTRICT OF ILLINOIS. } ss.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR SAID NORTHERN DISTRICT.

Eliza Jennings
*vs.* } *Assumpsit.*
The Town of Oregon.

It is hereby stipulated and agreed by and between the above parties by their respective attorneys that the shorthand reporter's notes of the evidence offered on the trial of the case of Alexander Wallace against the said town of Oregon heretofore tried in this court hereto attached may be used, considered and treated as though the same was evidence taken in this cause in due form.

It is understood, however, that either party may object on the trial to any of the books, papers or documents referred to, or any of the answers of the witnesses given in these reporter's notes, on the ground that the same is not relevant or material, and either shall
100 be at liberty to offer further and other proof in the cause.

It is further stipulated that the papers hereto attached and

marked respectively Exhibits "I," "J," "K," "M," "N," "O," "P," "Q," are each substantially correct copies of the original papers of which the same respectively purport to be copies, and that the paper hereto annexed dated June 1st, 1870, is a copy of the articles of consolidation made and entered into between the Ogle and Carroll County Railroad Company and the original Chicago and Iowa Railroad Company, which was ratified by the stockholders of said companies at their regular annual meetings held some time between the second day of July, A. D. 1870, and December 1, A. D. 1870, and that said copies, and each or either of them, may be read in evidence by either party with like force and effect as the original papers, records or articles or a duly certified copy thereof from the record.

And it is also admitted that the copies of the petition for election, and the election notice set out in defendant's second plea are also substantially correct copies of the originals of said papers, and
101 that no objection shall be taken on account of any clerical error or variance between said copies and said exhibits "I" and "J."

It is further admitted as a fact, for the purpose of the trial, that William Schultz was elected as one of the justices of the peace of the town of Oregon, April 5, 1870, and that he duly qualified as justice of the peace by giving bond and taking an oath of office, as required by law, April 9, 1870; that he continued to reside and live in said town of Oregon, in said Ogle county, until after April 3, 1871, and during the year 1871, but that he was absent from said town, and in the city of New York, from December 26, 1870, until about January 6, 1871, and that no successor to said Schultz as justice of the peace of said town was elected until the annual town meeting, held April 4, 1871, and such successor was not qualified by filing his official bond and oath until April 8, 1871, and did not receive his commission until April 15, 1871.

Dated CHICAGO, April 28, 1884.

S. W. PACKARD, *Attorney for Plaintiff.*
EDSALL, HAWLEY & EDSALL, *Attorneys for Defendants.*

It is also admitted that George M. Dwight was elected super-
102 visor of the said town of Oregon at the annual town meeting, held therein April 4, 1871, and duly qualified as such supervisor by taking an oath of office and giving and filing his official bond as such supervisor on the 10th day of April, 1871, and held such office for the next ensuing year.

May 2, 1884.

S. W. PACKARD, *Plaintiff's Attorney.*
EDSALL & EDSALL, *Attorneys for Defendants.*

103 UNITED STATES CIRCUIT COURT.

Alexander Wallace
*vs.*
Town of Oregon.

Before Blodgett, J., and a jury.

NOVEMBER 6, 1874.

TESTIMONY FOR PLAINTIFF.

WILLIAM R. BUSER, a witness called on behalf of the plaintiff, being duly sworn, testified as follows:

*Direct Examination.*

Witness says: I reside in the town of Oregon, and have resided there since 1847. I am town clerk and have been since April, 1874. Q. Have you the books and papers of the Town of Oregon in your possession? A. I have, sir. Q. Are you acquainted with Elias S. Potter? A. Yes, sir. Q. How long have you known him? A. I have known him ever since I have been in the Town of Oregon. Q. Where has he lived since that time? A. He has lived in Oregon. Q. Does he live there now? A. Yes, sir. Q.
104 Do you know Fred. H. Marsh? A. Yes, sir; I have known him since 1865. Q. Do you know the handwriting of Elias S. Potter? I think I should know it. Q. Do you know the handwriting of Frederick H. Marsh? A. Yes, sir. Q. (Handing papers to witness.) Will you look at those coupons and see if you know whose handwriting is signed there as supervisor and whose as town clerk, whose handwriting is that? (indicating.) A. To my knowledge it is Dr. Potter's—Elias S. Potter. Q. Whose handwriting is that (indicating); whose name is that? A. That I recognize as Frederick H. Marsh's. Q. State to the jury how these are signed and who by, all of them? A. The signatures of these bonds seemed to be signed by Elias S. Potter, supervisor. Q. What is this name here? A. Frederick H. Marsh. Q. Is the name of Elias S. Potter on the right, as supervisor,
105 and Frederick H. Marsh on the left, of all of these, in the handwriting of these two men? A. Yes, sir; to the best of my knowledge. Q. Where were you in April, 1871; in the first part of April, 1871? A. To the best of my knowledge at present, I was in Oregon. Q. Is there any paper there in reference to the appointment of anybody as supervisor of the town of Oregon? A. At what time? Q. At any time. For instance, the 31st day of December, 1870, or the 30th? A. No, sir; I have no document of that kind whatever. Q. Is there any filed of that kind? A. There is a file of a registration. Q. Is there any file of an appointment? A. No, sir; not that I can find. Q. What examination did you make among the files in the office for that paper? A.

I have made a thorough examination of it and, Mr. Marsh with me to assist me. Q. When did you make it? A. Yesterday
106 afternoon. Q. In whose possession have your papers been? A. In my possession. Q. Did you ever see that paper, the appointment of Dr. Potter, and his bond? A. No, sir; I never saw it; I looked for it one time in the summer here some time ago and could not find it, and thought perhaps I had overlooked the matter. Q. Was, or was not, that paper delivered to you by George Hormell, a former town clerk of that town? At any time since you have held the office? A. Not that I have any knowledge of. Q. Do you know any thing about whether it was or was not? A. I don't know as there was any such thing anywhere. I never saw any such document; I have heard it spoken of and looked for it and could not find it. Q. Is it among the files of books and documents belonging to the town clerk's office of the town of Oregon, now? A. Not to my knowledge. Q. Is it
107 among them? A. Not as I know anything about, as I said before; I got Mr. Marsh to assist me in examining all the papers and we could not find it. Q. Is it there or not? A. We could not find it. Q. You say you have looked over all the papers of your office, and the appointment of Dr. Potter as supervisor of that town, is not among the files of that office? A. No, sir, not among them. Q. Do you know of Dr. Potter doing any act as supervisor, before the election of George Dwight, if he was ever elected; his first election? A. No, sir, not to my knowledge. Q. Did you ever see any act that has been committed by him some time or other? (Objected to.) A. I have not seen him do anything. Q. Have you got any paper in your office showing the registration of parties,
108 justices of the peace (supervisors), on your records or files? A. I think not. Q. Is not there a brown paper among those files with the registration of Mortimer W. Smith on it? A. That was not as justice of the peace. Q. As supervisor? A. Yes, sir, I have that. Q. Let us see what that is (witness produces paper), whose handwriting is that? A. Well, that is Mortimer W. Smith's handwriting. I have seen his handwriting frequently. Q. Now, sir, have you any other papers connected with this matter of voting donations to the first division of the Ogle and Carroll County Railroad? A. Perhaps I have (producing). Q. Any other? A. Yes, sir (producing.) Q. This last vote of $40,000 is what I want; are these all the papers that you have in your possession as town clerk? A. They are all here, to the best of my knowledge. Q. I ask you if these are all the papers that you have here? A. I answer
109 as I did before, I took the safe, it was a little safe got up for the purpose of keeping the town records in; the papers are all here that I had in my possession, as far as my knowledge goes. We have looked as I stated before, we looked the papers all over, Mr.

Marsh and myself, to see that we got all the necessary papers, and we believe we have all that could be found in the town clerk's office, and we have all that were delivered to me, to the best of my knowledge.

MR. EDSALL: Q. Delivered to you by whom? A. By the former town clerk. Q. Mr. Hormell? A. Yes, sir.

MR. DUTCHER: Q. Now I ask you if there were not the papers of three different votes of donations to the Ogle and Carroll County Railroad delivered to you by George Hormell, former town clerk?

110 A. All very true. Now if there were any other papers aside from them, I have no knowledge of it. Q. You say you have made diligent search among all your books and papers, and cannot find any others? A. Yes, sir.

Mr. Dutcher of plaintiff's counsel states that the record of one of these votes in question is gone, also that the papers that were here on the former trial were taken home to Mr. Hormell and delivered.

Q. (Handing record to witness.) What is that? (Objected to.) Q. Is that a part of the records of the town of Oregon? A. Yes, sir. Q. This purports to be an election notice, dated the 24th day of May, 1870, notifying the legal voters that an election will be held for the purpose of voting $40,000, which is the vote we are talking about here.

The COURT: It appears on the regular records of the town.

Mr. DUTCHER: Yes, sir.

The COURT: That is sufficient.

111 Mr. DUTCHER: Q. Whose name is that? (Witness points out name.) Q. What is the date of that?

The COURT: That will show for itself.

Mr. EDSALL: Just give us the page that it is on?

Mr. DUTCHER: The election notice is page 7 (which is the records of which "Exhibit I" is a copy. The certificate of the clerk of that election is page 8. The election is 9, 10, 11, 12 and 13. "Exhibit R," is a copy of the certificate and election.)

Mr. WILLIAMS: That is the minutes of the meeting.

Mr. DUTCHER: Yes, sir. The record of the registration of Mortimer W. Smith will be found on page 17, which is "Exhibit P," hereto attached. The appointment of Elias S. Potter as supervisor of the town of Oregon, page 17, which is "Exhibit M," hereto

112 attached. I offer that book and contents in evidence in this case. (This book contains, on pages 19 and 20, the record of the meeting of the board of town auditors, held March 28, 1871, that being the only meeting between December 31, 1870, and April 4, 1871. At this meeting of March 28th, E. S. Potter's name is signed as supervisor, and acting as a member of the board, together with J. H. Cartwright, justice of the peace, and F. H. Marsh, town clerk. All the

material portions of said book are shown by the copies made therefrom and contained in the exhibits hereto annexed, except said meeting of March 28, 1871, above referred to.

The COURT: I think it admissible.

Mr. EDSALL: We will save an objection, particularly to the supervisor's resignation.

Mr. DUTCHER: What papers are those which you hold in your hands? Do they belong to the town clerk's office of the town
113 of Oregon? A. Yes, sir. Q. (Handing paper-bound book to witness.) What book is this? A. It is a book that was among the records when I took possession of the office. Q. Well, what book is it? Is it a part of the town reeords of the town of Oregon, or not? A. Yes, sir; it is.

The COURT: How do you describe it, Mr. Dutcher? A. It is merely a record book of the town of Oregon. That is on it in large letters. It is a paper-bound book. The other is a leather-bound one.

The COURT: Is there anything in that book which you wish to offer?

Mr. DUTCHER: I will see what there is in here. I have not had time to examine it. I supposed the originals would be here, as they were on the last trial. Q. I understand you to state, witness,
114 that you have never seen in your office, and now cannot find, after diligent search, the official oath or bond of Dr. Elias S. Potter, supervisor? A. No, sir; to the best of my knowledge. Q. Who was your predecessor as town clerk? A. Mr. George Hormell. Q. Who preceded him in the office? A. Mr. Frederick H. Marsh, I think.

Cross-examination waived.

Resignation of Mortimer W. Smith (being the same as Exhibit "P," hereto annexed), read in evidence under objection and exception of defendant's counsel. Election notice read in evidence (being the same as Exhibit "J," hereto annexed). Also record of meeting 23rd of June, 1870 (being the same as Exhibit "R," hereto annexed); also appointment of Dr. Potter (being the same as Exhibit "M," hereto attached) (under objection.)

The COURT: I suppose there is no dispute among you gentlemen but that the bond and oath of office was presented here at the former trial.

115 Mr. EDSALL: There was a paper of that kind presented here, and it was the one that was proved to be antedated back to the 30th of December. We raise no objection on account of the originals not being produced, certified copy of call for meeting read in evidence, the same being a part of records of another case in this court, under objection and exception of defendant's counsel. (This is the same as Exhibit "I," hereto attached.) Also Exhibit "M," of bill of complaint of William J. Mix and others, against Elias S.

Potter and others, purporting to be the appointment of Elias S. Potter, as supervisor, on the 31st day of December, 1870. (This is the same as Exhibit "M," hereto attached.) Also Exhibit "U," in the same case, which purports to be the official bond of Elias S. Potter (which is the same as Exhibit "N," hereto attached). Also Exhibit "O," purporting to be the oath of office taken on the
116 31st day of December, 1870 (which is the same as Exhibit "O," hereto attached). Also Exhibit "Q," purporting to be the certificate of the clerk (which is the same as Exhibit "Q," hereto attached.)

Recess to two P. M.

TWO P. M.

117 GEORGE W. HORMELL, a witness on behalf of the plaintiff, being duly sworn, testified as follows:

*Direct Examination by Mr. Dutcher.*

Q. What is your name? A. George W. Hormell. Q. Where do you live? A. Town of Oregon, county of Ogle, State of Illinois. Q. How long have you lived there? A. About twenty-one years. Q. How long have you known Elias S. Potter? A. I have a recollection of him some eighteen years. Q. Do you know his handwriting? A. Yes, sir. Q. How long have you known Frederick H. Marsh? A. About nine years. Q. Do you know his handwriting? A. Yes, sir. Q. (Handing bond to witness) State to the jury whose handwriting that is signed to the bonds and coupons that are here? (Objected to.) A. Frederick H. Marsh is signed here as town clerk, and Elias S.
118 Potter as supervisor.

The COURT: Is the signature there the genuine signature of those men? A. Yes, sir.

Mr. DUTCHER: Did you ever hold the office in that town? A. Yes, sir. Q. Do you recollect the papers that were here at the last trial, and used in this court? A. I recollect having a number of papers here. (Bonds offered in evidence by plaintiff's counsel.) (Objected to as immaterial.)

The COURT: For what purpose do you introduce the bonds?

Mr. DUTCHER: They are introduced to show that they are countersigned and registered in the auditor's office of public accounts at Springfield.

The COURT: Are there any recitals in this bond that it shall be in conformity with law or anything of that style?

Mr. DUTCHER: No, sir; they are in the usual form of municipal bonds?

The COURT: Is it not admitted that these are the bonds
119 from which the coupons in question are cut?

Mr. WILLIAMS: Yes, sir. (Plaintiff's counsel reads bonds in evidence, being the same bonds from which the coupons sued on in case of Wallace *vs.* Town of Oregon.)

The COURT: All the bonds bear the certificate of registration?

Mr. DUTCHER: Yes, sir; the only difference in the bonds is that some are payable at different dates. Q. Do you know James H. Cartwright? A. Yes, sir. Q. Has he ever acted in any official capacity in the town of Oregon? A. Yes, sir. Q. What? A. Justice of the peace. Q. Do you recollect when he commenced acting as justice of the peace? A. I do not. Q. For how
120 long has he continued to act, if at all, as justice of the peace? A. About five years, to my recollection. Q. For the last five years; he is justice of the peace now, isn't he? A. Yes, sir. Q. Do you know how long Frederick H. Marsh performed the duties of any office in the town of Oregon, and if so, when did he commence to perform such duties, and when did he go out of office? A. He went out of office, I think, some time in December, 1873–1872. Q. Who succeeded him? A. I did. Q. What office? A. Town clerk. Q. How long prior to 1872 had Captain Marsh held the position of town clerk in said town? A. My recollection is about three years. Q. Who was the town clerk in the spring of 1871—April? A. Frederick H. Marsh. Q. If he was town clerk in the spring of 1871, was he or not in the fall of 1870? (Objected to.) Q. Well, how do you know he was? A. As far as my recollection of records, there was no appointment made. (Objected to;
121 objection sustained.)

*Cross-Examination by Mr. Williams.*

Q. All you know is that in the spring of 1871, when you came to Oregon, Mr. Marsh was acting as town clerk? A. Yes, sir. Q. Whether he had been prior to that time, you couldn't say? A. No, sir.

*Re-direct Examination by Mr. Dutcher.*

Q. He acted as town clerk when you went away? A. Yes, sir. Q. And he was acting when you came back? A. Yes, sir.

FREDERICK H. MARSH, a witness called on behalf of plaintiff,
122 was duly sworn, and testified as follows:

*Direct Examination by Mr. Dutcher.*

Q. What is your name? A. Frederick H. Marsh. Q. Have you held any office in the town of Oregon and county of Ogle, and do you hold any now? A. I was town clerk at one time. Q. When did you commence acting as town clerk of that town? A. I believe it was in 1868; I am not positive as to the date. Q. How long did you act as town clerk of that town? A. About three

years. Q. Do you know who was acting as justice of the peace of the town of Oregon in December, 1870, and April, 1871? A. James H. Cartwright.

*Cross-Examination by Mr. Williams.*

Q. From what time to what time was James H. Cartwright acting as justice of the peace? A. Well, I don't remember; he is
123 acting now, but I do not remember the time he was elected; it was, I think, probably in 1869 or '70, somewhere along there; I do not remember exactly what year it was. Q. He has been acting since that time? A. Yes, he is acting now.

WILLIAM SCHULTZ, a witness called on behalf of the plaintiff,
124 was duly sworn and testified as follows:

*Direct Examination by Mr. Dutcher.*

Q. What is your name? A. William Schultz. Q. Did you ever hold any office in the town of Oregon? A. Yes, sir. Q. What? A. Justice of the peace. Q. Any other office? A. Yes, sir; town clerk. Q. When did you commence acting as justice of the peace in the town of Oregon, and when did you cease to act? A. I was elected in 1870, I think April, 1870. Q. How long did you act? A. Until the 2d or 3d of March, 1871. Q. Why didn't you act any longer? A. Because I resigned. Q. Were you absent at any time while you were acting as justice of the peace; if so, when and where were you? A. I was absent the last of December, 1870, about a week I was away down to New York City.
Q. About what day in December, 1870, did you leave, and
125 about what time did you come back to Ogle county in the State of Illinois? A. I think I left Oregon on the 26th of December and got back there again about the 6th day of January. Q. Who was the other acting justice of the peace of that town besides you? A. James H. Cartwright.

Cross-examination waived.

M. W. SMITH, a witness, called on behalf of plaintiff, was
126 duly sworn and testified as follows:

*Direct Examination by Mr. Dutcher.*

Q. What is your name? A. Mortimer W. Smith. Q. Where do you live? A. Oregon, Illinois. Q. How long have you lived there? A. Twenty-two years. Q. In the year 1870 did you hold any office in the State of Illinois? A. That year I was elected to the legislature. Q. Did you take your seat in the legislature under that election? A. I did. Q. In what month did you go to Springfield? A. I went there the last of December or the first

of January. Q. Well, sir, did you go the same day you gave your resignation? Were you on your way then to the depot? A. I wasn't on my way to the depot, but I went my first opportunity after that, the first conveyance out, I think. Q. The first train
127 after that? A. Yes, sir. Q. Had you held any office up to that time in the town of Oregon? A. Yes, sir; I was supervisor of the town. Q. Then you acted up to the time you sent in your resignation? A. Yes, sir. Q. Up to the date that is on that paper (handing paper to witness), the 30th of December? A. Yes, sir. Q. You immediately proceeded to Springfield and took your seat as a member of the house of representatives? A. Yes, sir.

*Cross-Examination by Mr. Williams.*

Q. What time did you commence to act as supervisor? A. I think I was elected, I am not certain whether it was that spring or the spring before; I think it was the spring before. Q. You say that you left Oregon immediately after offering that resignation that is shown there? A. Yes, sir. Q. Did you leave on that day? A. Not that day. I think I was at Springfield on the first day of the session, and I think there was a day intervening, I am not certain, but that was on Saturday and I
128 started on Monday. Q. You started on Monday, you think? A. It may have been so, I don't recollect. Q. Do you know what day the session opened at Springfield, the day of the week? A. No, sir; I do not, it was on Thursday or Wednesday, I think, the first week in January, if I recollect right. Q. You had a supervisor's book, did you not? A. Yes, sir; at that time, I had. Q. Did you deliver that to any one on leaving? A. No, sir; I did not. Q. You left it in your office? A. Yes, sir. Q. When did you return from Springfield? A. In April or May of that spring. Q. Before, or after the regular election of town officers that year? A. After. Q. Where was the supervisor's book on your return, was it in your office? A. I think it was still in my office. Q. You think then the supervisor's book had not been out of your office during the time of your absence at Springfield? A. I cannot say what may have been done while I was gone, I think it was
129 there. Q. You left it there when you went to Springfield, and found it there on your return? A. Yes, sir. Q. That supervisor's book is the official book in which the accounts of the supervisors of the town are kept? A. Yes, sir. Q. Is there any other book or books that has passed from one supervisor to the other with the office? A. I think that is the only one I ever had in my possession. There may be a book in which auditing is done, I don't know. Q. This supervisor's book then, as I understand it, is what is termed the supervisor's book of the town, and passed from one supervisor to the other, under the law? A. Yes, sir. Q. That is the book

you have reference to? A. Yes, sir. Q. Whom did you deliver your resignation to? A. I think to Captain Marsh, town clerk.

Q. Frederick H. Marsh? A. Yes, sir.

130 The COURT: Q. You qualified and acted as member of legislature that winter? A. I did, sir.

*Re-direct Examination by Mr. Dutcher.*

Q. Have you any recollection about that supervisor's book being in your office?

The COURT: O, I don't think that cuts any figure here.

Mr. DUTCHER: I don't think it does, either. I only wanted to satisfy myself that he was entirely mistaken. It is admitted by the defendants that there was no tax levy extended upon the collector's books, or any money collected through the officers of the town of Oregon, or the county of Ogle, for the purpose of paying the amount in question.

Coupons offered in evidence, being nineteen coupons from bonds numbered 29 to 33 inclusive, and 47 to 60 inclusive, which were sued upon in the case of Wallace *vs.* Town of Oregon, one of which, viz., that from bond No. 29, is as follows: (The clerk will here insert same.) The others are like the foregoing coupon, except

131 as to number of bond from which they were cut.

(Received subject to objection.)

Plaintiffs rest.

TESTIMONY FOR DEFENSE.

132 F. H. MARSH, recalled on behalf of defendants, testified as follows:

*Direct-Examination by Mr. Edsall.*

Q. Were you ever town clerk of the town of Oregon, Ogle county, of this state? A. Yes, sir. Q. At what time? A. I believe from 1869 or 1870 to 1872. Q. Were you ever in the employment of the Chicago and Iowa Railroad Company? A. I was. Q. Did you state what year you were town clerk? A. I said I believe I was town clerk from '69 to '72. I am not positive as to the years. Q. I wish you to look at the entry on page 17 of this record, which is the entry that is referred to as the appointment of Elias S. Potter as supervisor, and state if you were town clerk when that entry was made (which entry is the same as Exhibit "M" hereto attached)? A. I was; yes, sir. Q. When was

133 that entry made on your book, if you know? A. It was made the day before the spring election, I believe, if you can tell what year that was. Q. What year? A. 1871. Q. What election? Township election? A. Yes, sir. Q. The day before

the town meeting in the spring of 1871? A. Yes, sir. Q. What time in the day was it made? A. That I can not tell. Q. Who met there on that occasion? A. When this was made? Q. Yes? A. Well, I entered this record from the time. Q. Well, when the transaction was done from which you made the entry, who were there? A. Captain Cartwright and myself. Q. Met at what place? A. In the office of J. H. Cartwright. Q. In the town of Oregon, up there? A. Yes, sir. Q. What time in the day was that meeting held? A. Well, I can not tell that, because I can not understand your question clearly, whether you mean the time this appointment was made, or whether you have reference to
134 signing the bond. Q. Well, when the appointment was made? A. Well, that was made in the evening. Q. What time in the evening? A. That I cannot tell, what time exactly, it was after dark. Q. After dark on the day before the town meeting? A. Yes, sir. Q. To elect what officers was the town meeting? A. To elect supervisor and other town officers that were to be elected that year. Q. Who was present on that occasion, besides yourself and Mr. Cartwright? A. There was Mr. Potter, no, Mr. Potter was not present, Mr. Gale and Mr. Petrie, and there were parties coming in the office at the same time, but I don't know who they were. There were certain parties coming in and out; I don't know who they were; I believe Mr. Potter was in there once. Q. Was this known to the public there at that time? A. No, sir. Q. You say Mr. Cartwright was there; was he in
135 the employ of any railroad company? A. No, sir, I don't know whether he was in the employ of the railroad then or not. Q. Before that time or after? A. I know he has been since that time; I don't know whether he was at that time or not, of my own personal knowledge. Q. That transaction occurred there when you —that is, you and Mr. Cartwright assumed to appoint Mr. Potter as supervisor; you say that occurred on the evening before the election, the next day? A. Yes, sir. Q. Turn to the record, page 17? A. Yes, sir. Q. What is the date of that entry? A. It is dated the 31st day of November, 1870. Q. And it was actually done the next April after? A. Yes, sir. Q. The day before town meeting? A. Yes, sir. Q. Was Frederick G. Petrie there. A. I think he was. Q. Do you know whether he held any office in the Chicago and Iowa Railroad Company or not? A. No, sir; I do not know, that is of my own actual knowledge.
136 Q. (Handing coupons to witness.) Just look at those so as to see the signatures and the date of them? A. There is no date on them, they are signed by myself and E. S. Potter. Q. When were those papers signed, those coupons and bonds? A. They were signed on the evening before the township election at the same time the appointment was made. Q. At what date were the bonds dated?

A. On the 31st of December, 1870. Q. They were signed in April and dated back to December? A. Yes, sir. Q. Will you turn over to page 19, the meeting of the board of town auditors, where Mr. Potter's name appears, I wish you to examine this signature, E. S. Potter, on page 20 of this book, what date is it? A. 28th day of March, 1871. Q. Was Mr. Potter present at that meeting? Did Mr. Potter take any part in that meeting as supervisor? A. No, sir. Q. Do you know when your name was put there? A. No, I do not, that is the date, I am not positive about that. Q. Did you ever know of his assuming to act
137 as supervisor at any time before that night there? A. No, sir. Q. When did you say these coupons and bonds were signed? A. They were signed on the day preceding the town election. Q. In the day time or night time? A. It was in the night time or in the evening. Q. How late in the night did it take to go through with the inquiry? A. I don't remember, probably eleven or twelve o'clock, it might not be that late, I don't remember as to the exact time. Q. Who was present at that time? A. There was Dr. Potter, Mr. Gale and Mr. Cartwright. Q. Do you remember whether Mr. Gale held any office in either of these railroads?. A. I don't know of my knowledge, I suppose he did. Q. What was done with those bonds after the signing? A. I left them in the possession of Mr. Potter, I never saw them afterwards. Q. What did you understand was to be done with
138 them, you were one of the parties there. Q. State briefly what it was? A. I believe it was Captain Cartwright and myself discussing as to the propriety of signing those bonds, and Dr. Potter assured me they should be held in his hands the same as the hands of a third party; they should not go out of his hands until it was decided it was right; whether he meant decided by a court of law or not I don't know, but in connection with that he said he would go in and see Mr. Irving about it, who was, I believe, practicing in Chicago at the time. Q. You know about that oath of office and bond referred to, don't you? A. Yes, sir. Q. When were they in fact executed and the oath in fact taken and the bond in fact signed? A. The same time the other papers were signed. Q. Just before the election in April? A. Yes, sir. Q. Who was the security on the bond? A. Mr. Gale and Mr. Petrie. Q. Frederick G. Petrie? A. Yes, sir. Q. Where were those books and records kept from the time those entries were made for several weeks afterwards? A. They were kept right
139 there in my store. Q. How soon did the fact, if you know, become public that those papers had been signed? A. I do not know; it was public to some at that time, to some parties in town. Q. Well, so that people really knew of it, so that it was public? A. I do not know, it was not discussed for some time. It was some time

afterwards, except with some parties in town. Q. A few individuals knew it? A. Yes, sir. Q. Had you ever been requested to sign those bonds before that time; if so, by whom? A. Yes, sir, I had been requested to sign them. Q. By whom? A. By whom, that I don't remember; that is, the particular person. The matter was spoken of some time before the railroad got there. Q. Do you know of any efforts being made to get any other person appointed supervisors and have them sign them? A. Yes, sir; efforts were made to get Mr. Dwight, and Mr. Dwight refused; also Mr. Sharpe. Q. Do you know who applied to Mr. Dwight to be
140 appointed and sign the bonds? A. I believe—no, sir; I don't know positively; Mr. Dwight can tell that himself. I don't know about that. Q. Did they try to have any other person appointed besides Mr. Dwight?

Mr. DUTCHER: Who do — men by "they"?

Mr. EDSALL: Well, these people who were trying to get a supervisor appointed to sign the bonds? A. Mr. Cleaveland; Mr. Sharpe was spoken of. Q. Were those men connected with the railroad—these third persons? A. The question was asked me before. Of my own knowledge, I don't know. I never saw the record of their corporation, and do not know anything about it of my own knowledge. Q. Do you know who acted as directors, for instance, of the Chicago and Iowa railroad—as president? A. No, sir; I never saw the records to know. Q. Do you know who acted in public and who assumed to have matters in charge? A. Mr. Petrie was supposed to be president. I did not know anything about it. Q. Who were the directors acting with him? A.
141 Mr. Potter and Mr. Gale.

Mr. DUTCHER: You have made a mistake. He asked about the Chicago and Iowa railroad. A. I thought it was the Ogle and Carroll County railroad. Mr. Hinckley was the president of the Chicago and Iowa railroad.

Mr. EDSALL: Mr. Petrie was president of the Ogle and Carroll County road? A. Yes, sir. Q. And Mr. Gale and Mr. Potter were directors? A. Yes, sir. That is, supposed to be. I don't know whether they were directors or not. Q. They acted as such, I understood you to say. Is this the same Potter and Gale that you referred to before as being concerned with the appointment of Mr. Potter as supervisor? A. Yes, sir. Q. Do you know whether either of them acted as directors in the Chicago and Iowa company? A. I do not. Q. Do you know when this road was built through
142 from Rochelle to opposite Oregon there—the original line? A. Yes, sir. Q. When was it? A. In 1871 it was completed to Oregon. It got there about the first of April, 1871. Q. Had the track been built and completed between Rochelle and Oregon in January, 1871? A. No, sir. Q. Hadn't been any iron laid, had there? A. I don't

remember as to that. There might have been some little laid, but I don't remember as to that; very little, if any. Q. Had there been anything done west of Rochelle at that time, that is in the way of laying the track except grading? A. I don't know whether there had been any ties scattered along or not, but there might have been. I don't remember. I think there had been some ties laid along there. I know there was now.

*Cross-Examination by Mr. Dutcher.*

143 Q. Wasn't there iron laid for several miles? A. I think there was. That was the time they were to intersect with the North-Western. Q. Do you know what did stop the laying of iron, was it not the tearing up of the frog of the connection with the North-Western road? A. Yes, sir. Q. What office do you hold in Ogle county now? A. I do not know. Q. Have you been elected to any lately? A. Well, supposed to be, yes, sir. Q. What office? A. Supposed to be elected to the legislature. Q. What office does Mr. Petrie hold; this vagabond you have been speaking about holding office in Ogle county? A. I have not been talking about any vagabond? Q. Well, I meant the inference from the testimony. A. He is judge of the County court. Q. When was he elected? A. Last fall. Q. You say that bond was antedated, was not the date printed on every one of those bonds and was there ever a scratch of the pen put upon it? A. That is
144 the blank form; I don't remember about this; if you remember, there was two sets of bonds issued, and one was spoiled. Q. In all the bonds that were issued, was not that (indicating) printed in? A. If I could see the original bond I could tell, I don't know because there was two sets of bonds printed and one was wrong, and whether it was on account of the printing or not I do not—so I could not answer that question. Q. On the 31st day of December, 1870 did you have a conversation with Captain Marsh and Dr. Potter at the hotel of Mr. Lee, in reference to appointing him supervisor of the town of Oregon? A. Yes, sir; I did. Q. What was the understanding about your appointing Dr. Potter that night? A. I do not understand there was any understanding at all as to who should be appointed; it was spoken of. Q. It was talked about that night? A. Yes, sir. Q. But the actual appointment was made just before the town meeting in 1871? A.
145 Yes, sir. Q. Was not that result written on the record book about that time and the dates filled up afterwards? A. You want to know if this was written in the book on or about December 30th? Q. Yes, but the blank that was filled up and that copied from? A. No sir; it was not.

146 JAMES H. CARTWRIGHT, a witness called on behalf of the defendant, was duly sworn, and testified as follows:

*Direct Examination by Mr. Edsall.*

Q. Have you with you a copy of the articles of consolidation of these railroad companies? A. I have a copy (producing copy.) This is it. (This is the same as Exhibit A hereto attached.)

Mr. DUTCHER: We make no further objection to that paper than we do to the original.

Mr. EDSALL: Will you state who were the directors of the Chicago and Iowa Railroad Company in 1870 and 1871; well, in April, 1871; who acted as directors of the company—had control of its business? A. I don't know that I could tell who all the directors were; Mr. Hinckley was the general manager and president, Mr. James V. Gale was the vice president, and Philip D. Shumway, I think, was secretary. I don't think I could name
147 the directors without refreshing my recollection upon that point.

Q. Do you know whether Mr. Petrie or Mr. Potter were directors of either company, or president? A. I think they were. Q. Directors? A. I think they were directors. Q. Of the Chicago and Iowa? A. That is my recollection. Q. Did they hold any office in the Ogle and Carroll County railroad, up to the time of the signing these papers of consolidation? A. At the signing of those? Q. Yes? A. Mr. Petrie was president at the time of the consolidation, and, I think, Mr. Potter was a director. Q. In the Ogle and Carroll County railroad? A. In June, 1870. I think that was the first day of June, 1870. Q. After the execution of the papers of which this is a copy, what company, if any, has had control and management of the road, what company did so up through the year 1871; what was done with this paper after it was signed? A. I don't know; I don't know when it was signed; I
148 didn't see it at the time of signing. Q. Do you know when this was signed? A. No, sir. Q. Do you know what was done with it after it was signed? A. The first time I saw it after it was signed was, I should say, in June or July, 1871. Q. Where did you then see it? A. In my office. Q. Where had it been before that time, after the writing of the paper? A. I don't know; Mr. Petrie had it when I first saw it. Q. He was one of the directors of the Chicago and Iowa company; was he one of the men acting as such? A. I don't know how he acted, or whether he acted as director; he was reputed to be a director and president of the Ogle and Carroll County Railroad Company. Q. Did you draw the original paper; did you write it or make a copy of it? A. I had something to do with it; I didn't draw it all. Q. Didn't you make out the fair copy, that is, write out the copy which was in fact signed? A. No, sir; a clerk wrote the copy, the one that was signed; I might

149 have had something in the one that was finally signed, perhaps. Q. When was this drawn? A. About the time it bears date; I suppose it was; I don't remember. Q. And the next you saw of t was in the summer of 1871? A. Yes, sir. Q. And then Mr. Petrie had it? A. Yes, sir. Q. You said that Mr. Potter and Mr. Petrie and Mr. Gale acted as directors or presidents of one or both of these railroad companies? A. They were reputed to; I never saw them act; I was never present at their deliberations. Q. You were the attorney of the Chicago and Iowa company, were you not? A. Yes, sir. Q. And you understood them to be holding these offices, did you not? A. Yes, sir. Q. When did you commence to act as the attorney for the Chicago and Iowa Railroad Company? A. About the 2d day of August, 1870. Q. You are yet the attorney, are you not, of the company? A. Yes, sir.

*Cross-Examination by Mr. Dutcher.*

150 Q. Had the Chicago and Iowa Railroad Company any interest in common with the first division of the Ogle and Carroll County Railroad Company until after the completion of the road and the issuing of these bonds? A. I don't know. Q. Don't know that they ever had any? What did Mr. Petrie say to you about that paper when he delivered it, where it had been and why it had been in his hands. State what he said when he delivered it to you? A. I don't know as he said anything to me; Mr. Hinckley was present. Q. What did he say to Mr. Hinckley? A. He gave Mr. Hinckley the paper and said that it was all right, or something like that, and he would deliver the paper; Mr. Hinckley delivered the paper to me and I took it. Q. Was that before, or after the bonds were issued and the road completed, the first division of the Ogle and Carroll County Railroad? A. It was after the time. (Articles of consolidation offered in evidence. Objected to. Decision reserved.)

151 *Re-direct Examination by Mr. Edsall.*

Q. Do you recollect the time when the road was completed over as far as it was completed on the original line, on the east bank on the Rock river, opposite the town of Oregon? A. Yes, sir. Q. When was that? A. The first day of April, 1871. Q. When did the cars commence running? A. They ran to the end of the track that day, for the first time. Q. That was the part of the road built by the Ogle and Carroll County company, built under that name? A. Built by Mr. Hinckley as contractor for the company. Q. What company operated the road from that time, from the time they commenced running the cars? A. I don't know under what arrangement it was operated; it was operated in connection with the Chicago and Iowa, directly through. Q. Was it not, in fact,

the Chicago and Iowa company that was operating it at that time? A. I do not know; I do not know to what extent they did. Q.
152 Well, the men that had charge of their road, were they not the ones? A. Men in their employ were running it. Q. On what day of April did you say? A. On the first day of April. Q. It was before these bonds—these bonds were issued, was it not? A. Yes, sir. Q. They were not issued until two or three days afterwards? A. A day or two afterwards. Q. Since that time what company has continued to operate that road in connection with the other line? A. The Chicago and Iowa. Q. Has any other company ever operated it? A. No company to my knowledge. Q. And they commenced operating it about the 1st day of April, 1871? A. I suppose they began then, they had no rolling stock of their own, except one old engine; the rolling stock belonged to all the roads.

THE COURT: To other roads? Neither road had any rolling
153 stock? A. No, sir, except one old engine which was first marked Ogle and Carroll County Railroad Company, and afterwards C. & I., they changed the name on it.

Mr. EDSALL: Q. By whom was it in fact run and the business carried on? A. It was carried on by the employes of the Chicago and Iowa. Q. From the time it commenced running in April, 1871, to the present time? A. Yes, sir.

GEORGE M. DWIGHT, a witness called on behalf of the
154 defendant, was duly sworn and testified as follows:

*Direct Examination by Mr. Edsall.*

Q. Are you a supervisor of the town of Oregon? A. Yes, sir. Q. When were you first elected? A. In April, 1871. Q. Do you recollect the day of the month that the election took place? A. I think it was on the 4th. Q. Of your knowledge at that time. who had been the last supervisor of the town, so far as you knew at that time? A. Mortimer Smith. Q. Had you ever received any knowledge that Mr. Potter had ever claimed to be supervisor? A. No, sir. Q. Were you about the town among the people on the day of the election? A. Yes, sir. Not a great deal, I was in the shop most of the time. Q. Do you know whether it was known in the town by the public generally that these bonds in ques-
155 tion had then been issued and signed by any one on behalf of that town? A. I don't think it was, I didn't know and I didn't see anyone else that knew? Q. Don't you know that in fact it was understood that it was still an open question whether the bonds were to be issued or not? Q. State Mr. Dwight what there was about in your own way? A. Well, the most I ever said was that I was in favor of signing the bonds if it could be done legally, but

I should take competent counsel before I should sign them, and that would be decided by the town of Oregon. Q. When did you say that in connection with what did you say that? A. Previous to the election. Q. Well, don't you know that it was understood by the people that the question was still an open question whether or not the bonds should be signed.

The COURT: In short, Mr. Dwight, did you run as the candi-
date of a party that was in favor of withholding the signature of
156 the bonds for the time being, until some court should decide that
they should be voted; were you running as a candidate of that party, a party in favor of withholding the signature to the bonds and the delivery of the bonds until it was decided that the town to deliver them; that I understand to be your individual position; did the party who voted for you vote for you with that expectation? A. I know there was a good many who voted for me with that distinct understanding, that I would not issue the bonds until it was decided I could do so legally; there might have been others who voted for me with a different understanding. Q. Was there any other party who ran a candidate on some other platform? A. I understood that there was another candidate who would not issue the bonds. Q. Would not issue the bonds at all? A. No, sir. Q. How many candidates were there? A. Two.

*Cross-Examination by Mr. Dutcher.*

Q. Is it not true that the men who supported you were the
157 men who voted for issuing the bonds as a matter of justice to that
railroad company; was not that the understanding with the great majority of voters who voted for you? A. I don't know. I know know so far as I was questioned about the matter, I never gave any man to understand I would issue those bonds if I could not do it legally. Q. I asked you if you were not supported by every man that has been in favor of voting those bonds, and all the men except those that were opposing the payment of these bonds, those that were in favor of the Rockford and Rock Island road? A. No, I don't think that every man that voted with me voted with any such understanding. There may have been some that did; there might have been a good many. Q Will you name one who voted for you with any other understanding? A. Yes, sir. Q. Who? A.
Charles W. Potter, and he is in Chicago to-day; William Buser,
158 Hugh Ray. Q. Was not the straight issue made up for the
people between the men that ran Joseph Wagner and those that ran you, as to whether those bonds should be issued, or should not be issued, and don't you know it to be true? A. I think that was the issue among a great many voters; when you say amongst all, I don't think it was. Q. How many votes did you get, and how many did Mr. Wagner get? Q. I cannot tell you; I got a

great many more than he did. Q. Didn't you beat him nearly four to one? A. No, sir; I think not; I don't remember the numbers. Q. Didn't you beat him three to one?

The COURT: We will not go into majorities here.

Mr. DUTCHER: Didn't you come into the office within two or three days after you were elected and state that you were willing to issue those bonds? A. I don't recollect. Q. Didn't you do it, that is the question? A. No, sir; I don't think I did. Q. Didn't you say to Captain Marsh or to Mr. Petrie or to Mr. Gale, or any
159 other person, that you were willing to issue those bonds now? A. No, sir. Q. Were you not at some time told that those bonds had all been issued, and you would not have any trouble on that score? A. I did not know it until nearly a week after. Q. Did you know it a week afterwards? A. It may have been more than a week. Q. Somewhere about that time? A. Yes, sir; a week or ten days. Q. You have been supervisor from the time of that election up to the present time, haven't you? A. Yes, sir. Q. And are supervisor yet? A. Yes, sir. Q. Did you ever use any means or give any notice, if you had any knowledge of it that these bonds were not the legitimate bonds of the town of Oregon until the commencement of the suits on these coupons? A. I could explain that a little. Q. I don't ask for explanations, I ask if you ever did anything to notify the bondholders, or any other parties, up to the time you made your defense to these cou-
160 pons? A. No, sir.

*Re-direct Examination by Mr. Edsall.*

Q. Don't you know there was in fact a suit commenced there in the Ogle Circuit court last summer to restrain the taxes to pay these bonds? A. We were enjoined from assessing any taxes to pay these bonds? Q. By a suit commenced that same summer? A. Yes, sir.

Mr. DUTCHER: How do you know it was last summer? A. The papers were served on me last summer. Q. What time in the summer? A. In the early summer, it was along in the summer, my memory of dates is not very good. Q. Will you swear that it was before October? A. No, sir; I won't swear. Q. Well, why do you say it was early summer? A. That was my impression, that is the best of my judgment. Q. Then
161 some time during that season you had an injunction served on you; that is what you mean to be understood? A. Yes, sir; my impression is it was the early part of the summer. Q. Well if you are mistaken, then you are liable to be mistaken about the balance of your testimony, are you not, if your recollection is as poor as that? A. I have testified to some things here that I cannot be mistaken about.

Mr. SACKETT: I want to know whether I undertand the witness' answer to one question. Do I understand you to say that when you were running for supervisor you had given parties to understand that you would take advice and if it would be proper you would issue the bonds? A. I said I would take legal and proper counsel and would be satisfied before I issued those bonds. Q. And when you were satisfied you would issue them? A. No, I didn't state
162 that?

HUGH RAY, a witness called on behalf of the defendant, was duly sworn, and testified as follows:

*Direct Examination by Mr. Edsall.*

Q. Do you reside in the town of Oregon? A. Yes, sir. Q. Do you recollect the time when the first division of this Ogle and Carroll County railroad was built from Rochelle, over to near the river on the opposite side of the river from Oregon? A. It has been some years now. Q. When was it completed? A. The first of April, 1871. Q. Has it been operated since that time, the road? A. Part of it is. Q. What part of it? A. Part of it about half a mile east of the river they ran it through, and they stayed there from the 1st or 2d of April, to some time I think, in the fall, probably in November. Q. In the year 1871? A.
163 Yes, sir; they took the track up then and went away back, nearly three miles, started a new tract and run— (Objected to.) Defendants' counsel offers to prove that the consolidated Chicago and Iowa Railroad Company took up the last two and a half miles and took it a considerable distance south of the town. (Objection overruled.) Q. Were you present at that town meeting April 1871, when Mr. Dwight was elected supervisor? A. Yes, sir. Q. Did you take part in that election? A. I did. Q. Do you know whether it was known at that time among the people generally that these bonds had been issued? A. It was not known. Q. Whom did you vote for at that election? A. Mr. Dwight. Q. Did you have any understanding as to what Mr. Dwight's position was in regard to the issuing of the bonds?

164 The COURT: This is not material, Mr. Dwight has explained that himself.

Cross-examination waived.

Defendants rest.

## Testimony in Rebuttal.

Plaintiffs' counsel reads in evidence the deposition of Mrs. Eliza Jennings, which is the same deposition of Mrs. Jennings taken in the case of *Wallace* v. *Town of Oregon*, September 15, 1874, before Peter Ambler, at Salem, Ohio, was also read in evidence in this case.

Plaintiffs rest. Adjourned. November 7, 1874.

Mr. Dutcher offered to show in evidence certified copy of answer filed by the town of Oregon to bill of complaint asking for an injunction.

Testimony excluded. Laws of 1857, 1859 and 1869 put in
165 evidence (which said laws are the same produced in evidence in this case.)

167 Article of agreement and consolidation made this 1st day of June, in the year of our Lord one thousand eight hundred and seventy (A. D. 1870), by and between the Chicago and Iowa Railroad Company and the Ogle and Carroll County Railroad Company, both being corporations organized and established under the laws of the State of Illinois.

Witnesseth, Whereas, the parties of the first and second parts are desirous of consolidating with each other and are duly authorized by law to effect such consolidation as hereinafter provided. And whereas, the parties of the first and second parts have agreed upon terms and conditions hereinafter set forth as the terms and conditions of such consolidation, and have fixed upon and regulated the proceedings for the purpose of such consolidation by by-laws duly established by them respectively; and these articles are framed and executed on pursuance of such by-laws.

Now, therefore, this agreement witnesseth, that in consideration of the mutual agreement, covenants, provisions and grants herein contained the said parties of the first and second parts do by these presents merge, combine and consolidate their respective capital stocks, franchises, grants, immunities, privileges, capacities, pro-
168 perties and rights of way of every name and nature, into one company to be called and known by the corporate name and style of "The Chicago and Iowa Railroad Company," which said consolidated company shall from henceforth have and possess all and singular the rights, franchises, powers, immunities, privileges and capacities which are or have been granted to or conferred upon, possessed or enjoyed by either of said parties hereto by or under the laws or enactments of the general assembly of the State of Illinois. And the agreement further witnesseth that the said parties of the first and second parts have agreed upon and prescribed the following as the terms and conditions of such consolidation, which terms

and conditions the said parties of the first and second parts mutually covenant, promise and agree to observe, keep and perform, viz:

ARTICLE 1. The persons who shall be directors of the Chicago and Iowa Railroad Company at the time of such consolidation shall be the first directors of said consolidated company, and shall act as such until the next annual election of directors as is herein provided, and until their successors are duly elected.

ARTICLE 2. The number of directors for any year within such limits as are established by law may be fixed at the annual
169 meeting of the stockholders by a by-law adopted at such meeting.

ARTICLE 3. The first regular annual meeting of stockholders of said consolidated company shall be held on the first Wednesday in March, A. D. 1871. Special meetings may be called at any time by a majority of the board of directors. The board of directors of the said consolidated company shall, at their first meeting, appoint all necessary officers, and adopt such by-laws as they see fit, and may alter the same as they may from time to time think proper.

ARTICLE 4. The corporate seal of the consolidated company shall be that of the present Chicago and Iowa Railroad Company until otherwise ordered.

ARTICLE 5. The said consolidated company is hereby authorized to issue and dispose of an amount of stock equal to the amount of donations, municipal and other, made and to be made to the companies hereby consolidated in such a manner as the board of directors may prescribe, the proceeds thereof to be used in the further construction and equipment of said road.

ARTICLE 6. For each share of stock issued, or to be issued by the said Chicago and Iowa Railroad Company to its stock-
170 holders, and in like manner for each share of stock issued and to be issued by the Ogle and Carroll County Railroad Company to its stockholders there shall be issued the same amount of stock in the consolidated company hereby created.

ARTICLE 7. The capital stock of said consolidated company is hereby declared to be the aggregate of the stocks which the respective companies were authorized to create by virtue of the laws or enactments applicable thereto, or which the consolidated company is authorized to create by virtue of this act of consolidation and the laws authorizing the same, all of which powers are hereby expressly preserved to the consolidated company.

ARTICLE 8. Each and every existing bond, lease, contract, agreement, obligation, or liability heretofore entered into, assumed or agreed to, either by the present Chicago and Iowa Railroad Company or by the Ogle and Carroll County Railroad Company shall by sacredly discharged, fulfilled, and observed by the consolidated company hereby created.

ARTICLE 9. Consent and approval is hereby given to a consolidation between the company formed by these presents and any other railroad company on terms which may be determined by the board of directors of the company hereby created, and full
171 power and authority is hereby conferred upon the board of directors of said consolidated company to make and execute any such agreements and do any and all acts and things necessary or proper to carry such consolidation into effect, and these presents further witness that the said party of the first part in consideration of the premises and the sum of one dollar, duly paid by the said party of the second part, the receipt whereof is hereby acknowledged, doth hereby grant, convey, assign, set over and vest in said consolidated company for the purpose of such consolidation all the railroads of said party of the first part, and all the equipments and materials used or acquired therefor, and the rights, privileges, franchises, powers, and all the lands and rights to lands and property, money and effects, real and personal and mixed, and all rights of action and things of every name and nature now held or owned by the said party of the first part or in or to which the said party of the first part hath any right, title, interest or claim either in law or equity; and the said party of the second part, in consideration of the premises and the sum of one dollar, to it paid by the party
172 of the first part, the receipt of which is hereby acknowledged, doth hereby grant, convey, assign and set over to and vest in said consolidated company for the purpose of such consolidation all the railroads of said party of the second part, and all equipments, improvements and materials used or acquired therefor, and the rights, privileges, immunities, franchises, powers, and all the lands and property, money and effects, real and personal and mixed, and all rights of action and things of every name and nature now held or owned by the said party of the second part, or in or to which the said party of the second part hath any right, title, interest or claim either in law or in equity.

And the board of directors of the said consolidated company shall have full power to carry the said consolidation into effect by all necessary or proper acts and things for that purpose, and the said parties of the first and second parts for the consolidation aforesaid do mutually agree and declare that the said consolidated company shall go into operation immediately upon the due execution of the present articles except as to that portion of the Ogle and Carroll County railroad between the towns of Rochelle and Oregon,
173 now in course of construction, which shall not be affected by this consolidation until the track is laid from Rochelle to within one-half mile of Rock river, within the town of Oregon, and the other conditions are complied with to enable said company to obtain certain donations from the towns of Oregon, Nashua and Pine Rock, and other towns and individuals.

At any time after the track shall have been laid as aforesaid the consolidated company may take possession of and use said railroad as a part and parcel of their said railroad, but they shall not delay doing the same after the tracks of the two hereby consolidated companies are connected at Rochelle.

In testimony whereof, the said parties of the first part and the second part have caused their seals to be hereto affixed and same to be attested by their respective presidents and secretaries in the day and year first above written.

THE CHICAGO AND IOWA RAILROAD COMPANY,
[L. S.] BY F. E. HINCKLEY, *President.*
Attest. P. B. SHUMWAY, *Secretary.*

THE OGLE AND CARROLL COUNTY RAILROAD COMPANY,
[L. S.] BY FREDERICK G. PETRIE, *President.*
Attest. M. L. ETTINGE, *Secretary.*

174 EXHIBIT I.

*To the Town Clerk of the town of Oregon, in the county of Ogle, and State of Illinois:*

The undersigned, legal voters of the said town of Oregon, in the county and state aforesaid, do hereby make application to you, and request that an election shall be held in said town under the provisions of an act of the general assembly of the State of Illinois, entitled "An act to amend an act entitled an act to incorporate the "Ogle and Carroll County Railroad Company, approved March "30th, A. D. 1869," to determine whether said town shall, in its corporate capacity, make a donation to the said Ogle and Carroll County Railroad Company of the sum of forty thousand dollars in the bonds of said town, in such denominations as said company may designate—not less than one hundred dollars each, payable, at the option of said town, within twenty years from the date of their issue, bearing interest from date at the rate of seven per cent. per an-
175 num, payable annually, and principal and interest payable at such place as said company may designate, to aid in the construction of the first division of said Ogle and Carroll County railroad; said bonds not to be issued, dated or delivered until said company shall have completed said first division of said railroad, with a T rail, weighing not less than forty-five pounds to the yard, in condition to run trains thereon from a connection or intersection with the Chicago and North-Western railway to a point at and within said town of Oregon, within one-half mile of the east bank of Rock river, and shall have equipped the same with rolling stock sufficient to operate a daily train to and from said town for the accommodation of passengers and freight, nor until said company shall have released said town from all liabilities on account of donations heretofore voted, except a donation of ten thousand dollars voted by said town on the ninth day of December, A. D. 1869, said vote and

donation of forty thousand dollars to be null and void unless
176 said first division of said railroad shall be completed and equipped as aforesaid on or before the first day of January, A. A. 1871; but in case the same shall be so completed and equipped within the time aforesaid, and said company shall execute and deliver said release, then the said bonds to be deliverable upon the demand of said company, and to bear date of the day of delivery.

And we request that immediate notice be given of such election, and that the same be held on the 23d day of June, A. D. 1870.

Dated this 24th day of May, A. D. 1870.

H. A. Mix,
Ed. T. Ritchie,
John Matmiller,
177 T. M. Elliott,
A. V. Lang,
John R. Petrie,
John Rutledge,
E. Piersol,
L. M. Strop,
E. B. Frost,
J. Foster,
Chester Jenkins,
Samuel Wilson,
George P. Jacobs,
Perry Barker,
D. C. Sears,
Daniel Michael,
John D. Caxman,
G. W. Reiman,
Jacob Buser,
George W. Crofts,
M. L. Ettinger,
Z. F. Snyder,
Mortimer W. Smith,
R. B. Artz,
Daniel Etnyre,
J. E. Hitt,
F. W. Fox,
H. C. Burchell,
O. Wilson,
Daniel E. Lee,
Wm. Stair,
Amos Salisbury,
Benj. R. Wagner,
A. L. Ettinger,
Richard Lee.

Christian Lehman,
Wm. Schultz,
G. L. Richardson,
Ernest Lindig,
H. B. Michael,
Benj. Tappen,
D. F. Raila,
John Sharp,
A. M. Heilig,
J. B. Mix,
Lewis Wertz,
A. Jenkins,
D. H. Carey,
L. C. Hormell,
B. F. Sheets,
John F. Bull,
Ed. F. Dutcher,
J. W. Etnyre,
Wyck R. C. Reynolds.
Scott Gale,
John Riordon,
Robert C. Burchell,
F. H. Marsh,
George L. Snyder,
Cyrus Eyster,
Thomas Chasm,
John McCaulay,
Oscar Howard,
Isaac Seysta,
Seth Marvin,
P. Jacobs,

178 I certify that the above is a correct copy from the records of this office. F. H. MARSH, *Town Clerk.*

179 "EXHIBIT J."

*Election Notice.*

Whereas more than twenty legal voters of the town of Oregon, in the county of Ogle and State of Illinois, have presented to me, clerk of said town, a written application requesting that an election be held in said town under the provisions of an act of the general assembly of the State of Illinois, entitled an act to amend an act entitled an act to incorporate the Ogle and Carroll County Railroad Company, approved March 30th, A. D. 1869, to determine whether said town shall, in its corporate capacity, make a donation to the said Ogle and Carroll County Railroad Company, of the sum of forty thousand dollars in the bonds of said town, in such denominations as said company may designate, not less than one hundred each, payable at the option of said town, within twenty years from the date of issue, bearing interest from date at the rate of seven per cent. per annum, payable annually, and principal and interest payable at
180 such place as said company may designate, to aid in the construction of the first division of said Ogle and Carroll County railroad, said bonds not to be issued, dated or delivered until said company shall have completed said first division of said railroad, with a T rail weighing not less than forty-five pounds to the yard, in condition to run trains thereon from a connection or intersection with the Chicago and North-Western railway, to a point at and within said town of Oregon, within one-half mile of the east bank of Rock river, and shall have equipped the same with rolling stock sufficient to operate a daily train to and from said town for the accommodation of passengers and freight, nor until said company shall have released said town from all liability on account of donation heretofore voted, except a donation of ten thousand dollars voted by said town on the 9th day of December, A. D. 1869, said vote of forty thousand dollars to be null and void unless said first division of said railroad shall
181 be completed and equipped as aforesaid, on or before the first day of January, A. D. 1871, but in case the same shall be so completed and equipped within the time aforesaid, and said company shall execute and deliver said release, then the said bonds to be deliverable upon demand of said company, and to bear date of the day of delivery.

The inhabitants, legal voters of the said town of Oregon, are therefore hereby notified that an election will be held by the legal voters of said town, at the court house in said town of Oregon, on Thursday, the 23d day of June, A. D. 1870, at 9 o'clock in the forenoon of said day, for the object and purpose of voting upon and determining the matters and questions hereinbefore and in said written application set forth and contained.

Given under my hand, at my office in said town of Oregon, this 24th day of May, A. D. 1870.

F. H. MARSH, *Town Clerk of said town.*

I hereby certify that this is a correct copy of the records on
182 file in this office. T. H. MARSH, *Town Clerk.*

183 "EXHIBIT K."

Pursuant to notice given according to law, the voters of the town of Oregon, county of Ogle, and State of Illinois, assembled at the court house in Oregon, at 9 o'clock A. M. on Thursday, the 23d day of June, A. D. 1870. The meeting was called to order by the town clerk, and on motion of W. J. Mix, E. J. Reiman was chosen moderator of said meeting, and was duly sworn by the town clerk. Proclamation was then made of the opening of the polls, which was kept open until twelve o'clock M., when, on motion of O. Wilson, they were closed for one hour, until one o'clock, for dinner, by proclamation of the town clerk. At one o'clock the polls were again proclaimed open, and was kept open until six o'clock P. M., proclamation being made half hour before the closing of the polls. At the hour of six P. M. the moderator proceeded to count out the ballots, until they were all counted, which number equaled the numbers on the poll-list. The ballots were then read by the moderator, and resulted as follows: There being for donation, as stated in the notice, one hundred and sixty-three votes; against donation, as stated in the notice, twelve votes. The result being publicly read, the meeting was then closed. E. J. REIMAN, *Moderator.*

184 Attest, F. H. MARSH, *Town Clerk.*

Poll list kept by the clerk at town meeting (special) held at the court house in the town of Oregon, in the county of Ogle and State of Illinois, on the 23d day of June, A. D. 1870:

| No. | Names. | No. | Names. |
|---|---|---|---|
| 1 | Wm. J. Mix. | 53 | C. H. Watson. |
| 2 | F. H. Marsh. | 54 | David Gramon. |
| 3 | E. J. Reiman. | 55 | Daniel Etnyre. |
| 4 | Michael Nohe. | 56 | James V. Gale. |
| 5 | Jos. Sears. | 57 | A. McMallen. |
| 6 | Benj. R. Wagner. | 58 | James Johnston. |
| 7 | T. M. Elliott. | 59 | P. Jacobs. |
| 8 | A. V. Lang. | 60 | E. Norton. |
| 9 | G. L. Richardson. | 61 | W. Haminch. |
| 10 | G. P. Jacobs. | 62 | Matthew Vaughn. |
| 11 | Orvis Wilson. | 63 | G. W. Phelps. |

| No. | Names. |
|---|---|
| 12 | Allen Mulkins. |
| 13 | F. G. Petrie. |
| 14 | A. M. Heilig. |
| 15 | Scott Gale. |
| 16 | James Cartright. |
| 17 | Frill Artz. |
| 18 | Robert Davis. |
| 19 | J. Borbridge. |
| 20 | Wm. Schultz. |
| 21 | De Witt Sears. |
| 22 | Richard Lee Sen. |
| 23 | John Leedig. |
| 24 | John R. Petrie. |
| 25 | E. L. Wells. |
| 26 | B. F. Sheets. |
| 27 | Geo. Shipman. |
| 28 | Theodore Reynolds. |
| 29 | Horace Howard. |
| 30 | R. H. Lee. |
| 31 | M. W. Smith. |
| 32 | Wm. Artz. |
| 33 | Lewis Hormell, Sen. |
| 34 | Erastus Wadsworth. |
| 35 | G. W. Reiman. |
| 36 | Hiram Hill. |
| 37 | Richard Donovan. |
| 38 | E. P. Piersol. |
| 39 | John Matmiller. |
| 40 | Wm. Helm. |
| 185 41 | John Sharp. |
| 42 | E. F. Brownell. |
| 43 | David Kailer. |
| 44 | Silas Hawthorne. |
| 45 | Elnathan Stevens. |
| 46 | M. L. Babcock. |
| 47 | E. S. Potter. |
| 48 | Jos. D. Artz. |
| 49 | D. Vanston. |
| 50 | John Bardwell. |
| 51 | Jos. W. Hitt. |
| 52 | Frank Sours. |
| 186 105 | M. L. Ettinger. |
| 106 | Elias Etnyre. |
| 107 | Jos. Rebberger. |
| 64 | Michael Sours. |
| 65 | J. M. Gave. |
| 66 | E. F. Dutcher. |
| 67 | Albert Woodcock. |
| 68 | J. S. Berry. |
| 69 | O. F. Miller. |
| 70 | John Rutledge. |
| 71 | E. R. Light. |
| 72 | John F. Gantz. |
| 73 | Saml. Root, Jr. |
| 74 | G. W. Hill. |
| 75 | Orlando Artz. |
| 76 | John Cox. |
| 77 | Charles Beaman. |
| 78 | Jacob Buser. |
| 79 | Geo. Poll. |
| 80 | Lemuel Wood. |
| 81 | E. Glasgow. |
| 82 | James Seyster. |
| 83 | Almenn Jenkins. |
| 84 | E. T. Ritchie. |
| 85 | C. Leman. |
| 86 | Amos Salsbury. |
| 87 | G. A. Bunker. |
| 88 | R. C. Burchell. |
| 89 | Lewis Wertz. |
| 90 | William Shott. |
| 91 | B. Brundage. |
| 92 | A. C. Foote. |
| 93 | E. J. Waite. |
| 94 | G. W. Snyder. |
| 95 | Charles Robbins. |
| 96 | Geo. Dwight. |
| 97 | J. A. Steffa. |
| 98 | Finly Root. |
| 99 | Amos Austin. |
| 100 | E. P. Frost. |
| 101 | Jacob Ites. |
| 102 | Luther Strop. |
| 103 | John Reese. |
| 104 | Chester Eastman. |
| 141 | George Currier. |
| 142 | Frank Keyes. |
| 143 | A. Barnum. |

| No. | Names. | No. | Names. |
|---|---|---|---|
| 108 | W. W. Bennett. | 144 | P. Barker. |
| 109 | W. Mellinger. | 145 | J. K. Cleveland. |
| 110 | M. Goldsmith. | 146 | John Waldie. |
| 111 | John Post, Sr. | 147 | Patrick Danor. |
| 112 | John Featherspерle. | 148 | John Grale. |
| 113 | Bernard Loos. | 149 | John Reardon. |
| 114 | Hugh Rea. | 150 | Tyras Weltz. |
| 115 | Robert Rea. | 151 | H. L. Currier. |
| 116 | W. R. Reynolds. | 152 | H. Soloman. |
| 117 | John Herbert. | 153 | T. McCue. |
| 118 | James Black. | 154 | Alex Alty. |
| 119 | B. W. Woodside. | 155 | James Duch. |
| 120 | Cyrus Eyster. | 156 | I. S. Wooley. |
| 121 | John Slain. | 157 | Wm. Williamson. |
| 122 | James Hoar. | 158 | David Collins. |
| 123 | John Coxman. | 159 | James Buright. |
| 124 | Harvey Jewett. | 160 | Lewis Burr. |
| 125 | Geo. Beckman. | 161 | Clayton Fanble. |
| 126 | Francis Shinn. | 162 | Geo. Lelly. |
| 127 | Patrick Farrell. | 163 | John Bull. |
| 128 | Sam'l Roat. | 164 | Albany Matmiller. |
| 129 | Wm. Buser. | 165 | Wm. Starr. |
| 130 | Dan'l Stoat. | 166 | Zac Sinder. |
| 131 | Joseph Matmiller. | 167 | Samuel Cazort. |
| 132 | Joseph Etnyre. | 168 | C. Wessenberger. |
| 133 | Henry Burchell. | 169 | A. Jewett. |
| 134 | David Kagarice. | 170 | Jos. Ressler. |
| 135 | Christian Kagance. | 171 | Martin Wade. |
| 136 | Daniel Lee. | 172 | C. Emerson. |
| 137 | Joseph Wagner. | 173 | Chas. Potter. |
| 138 | L. C. Shiner. | 174 | John Post. |
| 139 | Edward Brown. | 175 | A. L. Ettinger. |
| 140 | Frank Post. | | |

Total number of ballots 175.

Attest, F. H. MARSH, *Town Clerk.*

I certify that the above is a correct copy from the records on file in this office. F. H. MARSH, *Town Clerk.*

187 EXHIBIT "M."

TOWN CLERK'S OFFICE, OREGON, ILL.

Board of town auditors met for the purpose of filling the vacancy of supervisor, caused by the resignation of M. W. Smith. E. S.

Potter was appointed to fill vacancy, and the clerk ordered to give the certificate of appointment to the said E. S. Potter.

Witness our hands this 31st day of December, A. D. 1870.

*J. P.*

JAMES H. CARTRIGHT, *J. P.*
F. H. MARSH, *Town Clerk.*

I certify that the above is a correct copy from the records of this office. F. H. MARSH, *Town Clerk.*

188 EXHIBIT "N."

Know all men by these presents that we, Elias S. Potter, of the town of Oregon, in the County of Ogle and State of Illinois, as principal, and Frederick G. Petrie and James V. Gale, of said county and state, as sureties, are held and firmly bound unto the said town of Oregon, for the use of the inhabitants of said town, in the sum of five hundred dollars, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators and each of them jointly, severally and firmly by these presents.

Sealed with our seals and dated this 31st day of December, A. D. 1870.

The condition of the above obligation is such that whereas the above bounden Elias S. Potter has been appointed supervisor of said town of Oregon, to fill a vacancy caused by the resignation of Mortimer W. Smith;

Now, therefore, if the said Elias S. Potter shall faithfully discharge all the duties of his said office, required by him by law, in relation to the town revenue, then the above obligation to be void and of no effect, otherwise to remain in full force and effect.

189 E. S. POTTER. [SEAL.]
F. G. PETRIE. [SEAL.]
JAMES V. GALE. [SEAL.]

I certify that this is a correct copy of the records of this office.
F. H. MARSH, *Town Clerk.*

EXHIBIT "O."

STATE OF ILLINOIS, } ss.
OGLE CO. }

I, Elias S. Potter, having been appointed to the office of supervisor of the town of Oregon, in said county and state, do solemnly swear that I will support the constitution of the State of Illinois, and that I will faithfully discharge the duties of the office of supervisor according to the best of my ability. E. S. POTTER.

Subscribed and sworn to before me this 31st day of December, A. D. 1870. J. H. CARTRIGHT, *J. P.* [SEAL.]

190 EXHIBIT "P."

TOWN OF OREGON, COUNTY OF OGLE AND STATE OF ILLINOIS.

*To Fred H. Marsh, Clerk of the Town of Oregon.*

SIR: I have the honor to hand you this day my resignation as supervisor of the town of Oregon. M. W. SMITH.

Dated at Oregon this 30th day of December, A. D. 1870.

I certify that the above is a correct copy from the records of this office. F. H. MARSH, *Town Clerk.*

191 EXHIBIT "Q."

OREGON, Ill., July 7, 1870.

*To the Hon. Clerk of the County Court, County of Ogle and State of Illinois.*

SIR: I have the honor to notify you that the town of Oregon, county of Ogle and State of Illinois, on the 23d day of June, A. D. 1870, voted a donation of forty thousand ($40,000) to the Ogle and Carroll County Railroad Company by a vote of 163 for donation to twelve against. I have the honor to be, sir, your obedient servant,

FRED H. MARSH, *Town Clerk.*

STATE OF ILLINOIS, } ss.
COUNTY OF OGLE. }

I, Albert Woodcock, clerk of the County court and of the county and state aforesaid, do certify that the above and foregoing is a full, true and perfect copy of an instrument in writing now on file in my office, with which the above has been by me carefully compared.

I further certify that said instrument was filed in my said office on the 7th day of July, A. D. 1870, as appears from the endorsement of filing upon the back thereof.

192 In testimony whereof, I have hereunto set my hand and the seal of said court and county at my office in Oregon, this 5th day of July, A. D. 1871. ALBERT WOODCOCK, *Clerk.*

[SEAL.]

Endorsed. Filed August 29, 1871.
F. G. PETRIE, *Clerk.*

Filed March 3, 1873.
WM. H. BRADLEY, *Clerk.*

NORTHERN DISTRICT OF ILLINOIS—ss.

I, William H. Bradley, clerk of the Circuit court of the United States for said Northern District of Illinois, do hereby certify the above and foregoing to be a true and correct copies of Exhibits I,

J, K, M, N, O and Q, being part of a transcript from Ogle county, Illinois, filed in said court on the 23d day of March, A. D. 1873, in the cause lately pending, wherein William J. Mix *et al.* are the complainants, and Elias S. Potter *et al.*, are the defendants, as the same appears from the said transcript of record now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and af-
163 fixed the seal of said court at my office in Chicago, in said district, this 31st day of March, A. D. 1884.

[SEAL.] WM. H. BRADLEY, *Clerk.*

Endorsed. Filed November 4, 1885.

WM. H. BRADLEY, *Clerk.*

The plaintiff also offered and read in evidence the certain
194 stipulation dated January 24, 1885, and filed November 7, 1885, together with the charge of Judge Blodgett in the case of *Wallace* v. *Town of Oregon* thereto attached, which was received in evidence subject to the objection of the defendant as respects the said charge, that the same was incompetent and irrelevant as follows:

195 UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS, } ss.

IN THE CIRCUIT COURT OF THE UNITED STATES, IN AND FOR SAID DISTRICT.

Eliza Jennings
*vs.*
The Town of Oregon.

In order to avoid unnecessary expense, it is hereby stipulated and admitted that the bonds and coupons referred to in the plaintiff's declaration, numbered from 29 to 37 inclusive, and 46 to 60 inclusive, are signed with the genuine signatures of E. S. Potter and F. H. Marsh, as they purport to be, but nothing is hereby admitted as to the official character of said parties who so signed said bonds and coupons.

It is also stipulated and admitted that Alexander Wallace, on the 18th day of January, 1873, brought suit in this court upon certain coupons belonging to certain bonds purporting to have been issued by said town of Oregon, and that the pleadings in said case were the declaration containing a special count upon the coupons so
196 sued upon in that suit, and the common counts in assumpsit, and the general issue of non-assumpsit duly sworn to. That the annexed paper contains a correct report of Judge Blodgett's charge to the jury in that case, which, so far as competent and pertinent to the issues, may be read in evidence, but the defendant re-

serves the right to object to said charge on the ground that the same is immaterial, incompetent and irrelevant to the issues in this suit.

It is further admitted on the part of the plaintiff in this suit that the value of the taxable property in said town of Oregon, as ascertained by the last assessment of taxable property within said town, for state and county taxes, previous to the issue of the bonds and coupons sued upon in this case, to wit: for the year 1870, was less than ($200,000) two hundred thousand dollars, that is to say: the taxable property in said town was for said year assessed by the town assessor of said town at ($159,379) one hundred and fifty-nine thousand three hundred and seventy-nine dollars; that such assessment was for said year equalized by the board of supervisors of the county of Ogle, in which said town was situated, at the sum of, and reduced to, ($141,985) one hundred and forty-one thousand nine hundred and eighty-five dollars; and that the said equalized assessment so made by the board of supervisors was for said year equalized by the board of equalization of the State of Illinois at,
197 and increased to, the sum of ($187,310) one hundred and eighty-seven thousand three hundred and ten dollars, as appears from the assessor's and collector's books for said town, and the records and files of said Ogle county; upon which said last-mentioned equalized assessment the state and county taxes were extended and collected in said town for said year.

And it is further admitted that at the time of the issuing of the bonds and coupons sued upon in this case, the said town of Oregon then owed and had existing an indebtedness to the amount of ($10,000) ten thousand dollars for principal, with the accrued interest thereon represented by twenty bonds of said town, numbered from 1 to 20 inclusive, for $500 each, dated December 16, A. D. 1869, payable ten years after date, with interest at ten per cent. per annum, payable annually, in accordance with the interest coupons thereto attached, and which last-mentioned bonds are the same bonds referred to as the bonds "numbered from 1 to 20 inclusive," in the bonds to which the coupons were attached upon which this suit is brought.

It is further admitted that the "Town of Oregon," mentioned in § 2 of the act entitled "An Act to amend an Act entitled 'An Act to incorporate the Ogle and Carroll County Railroad Company,'" approved March 30, 1869, is the village of Oregon, on the west side of Rock river, situated within the township of Oregon,
198 the defendant in this suit, which said township is situated on both sides and extends two miles east of said Rock river.

It is further admitted that no vote was taken in the town of Oregon upon the question of issuing the bonds involved in this suit subsequent to the vote taken June 23, 1870, which said vote was

taken on the written application and election notice, copies of which are attached to stipulation, dated April 28, 1884.

CHICAGO, Jan. 24, 1885.

S. W. PACKARD,
*Plaintiff's Attorney.*
EDSALL & EDSALL,
*Defendant's Attorneys.*

JUDGE'S CHARGE.

199 The court then charged the jury as follows:

Gentlemen of the jury, from the view which I take of this case, there are very few what may be termed disputed facts in the case. The main difficulty in the case is rather in inferences which counsel insist shall be drawn from certain facts, than from any dispute in regard to the existence of the facts themselves. The admitted facts in the case seem to be these: By an act of the legislature of this state passed in 1857 there was a corporation created with authority to construct a railroad from certain points west and east through the town of Oregon, in the county of Ogle. By an amendment to that act approved on the 30th March, 1869, the towns and cities along the line of this railroad were authorized to vote donations in aid of the construction of the railroad, and to issue their bonds in payment of such donations. The act provided in substance—I will read it in order that you may comprehend it: Sections 5 and 6, Private Laws 1869, Vol. 3, p. 324:

"§ 5. That the several towns, villages and cities, organized or incorporated under any laws of this state, along or near the
200 route of this railroad, as authorized to be constructed under the original act and amendment thereto, or under this act, or that are in any wise interested in having said road, or any branch or division thereof, constructed, may in their corporate capacities subscribe to the stock of said company, or may make donations thereto, or may lend its or their credit to said company, to and in constructing and equipping said road, or any division or branch thereof. *Provided*, that no such subscription, donation or loan shall be made until the same shall be voted for as hereinafter provided."

"§ 6. That whenever twenty legal voters of any such towns, villages or city shall present to the clerk thereof a written application requesting that an election shall be held to determine whether such town, village or city shall subscribe to the capital stock of said company or make a donation thereto, or loan money or bonds or its credit to aid in the construction of said road or any branch or division thereof, stating the amount and whether subscribed, donated or loaned, and the rate of interest and the time of payment, such clerk shall receive and file such application and immediately proceed to post written notices of an election to be held by the legal voters of

such town, village or city, which notices shall be posted in ten of the most public places in such town, village or city for thirty days preceding such election, and shall state fully the object of such
201 election, and such election shall be held and conducted and return thereof made as is provided by law, and in any village or city as is provided by the law under which the same is incorporated, and an additional return shall be made to one of the directors of said company; each elector at such election shall deposit a ballot for said subscription, donation or loan, and if a majority of the legal voters of such town, village or city voting at such election shall vote for such subscription, donation or loan, then such town, village or city shall, by its proper corporate authorities, subscribe to the stock of said company, or donate or loan thereto as shall be determined at said election, and shall issue to the said railroad company its bonds in such denominations as said company may designate, not less than one hundred dollars, and bearing interest as may be determined at such election, not to exceed ten per cent. per annum, payable annually at such place as such company may designate, which bonds shall be signed by the supervisor and countersigned by the clerk in towns organized under the township organization law, and in incorporated villages or cities signed by the president of the board of trustees and countersigned by the clerk or by the officers having similar powers and duties in any such village or city; and any such town, village or city so subscribing, donating or loaning as
202 aforesaid, shall, by its proper corporate authority annually thereafter, assess and levy a tax upon the taxable property of said town, village or city, sufficient to pay and liquidate the annually accruing interest on such bonds, and so much of the principal thereof, as from time to time shall become due, which taxes shall be levied and collected in the same manner as other corporation taxes in such town, village or city: *Provided*, that for the payment of the principal thereof such tax shall not exceed two per cent. per annum." (Private Laws 1869, Vol. 3, p. 324.)

It further appears in evidence that a petition was presented to the town clerk, asking for the calling of a special election to vote upon the question of donating to this railroad corporation forty thousand dollars, and that notices were duly posted in ten public places, and the election held in pursuance of such notice, and the vote in favor of the making of the donation and the payment thereof in bonds, as provided in the notices, was almost unanimous. The notice calling the meeting to vote on the question directed that the donation or proposition to issue bonds should be null and void unless this railroad was completed and the cars running upon it—I think that was the language—by the first day of January, 1871. It is conceded that the Ogle and Carroll County Railroad Company proceeded to construct its railroad from a point on the east side of Rock

river, opposite the town of Oregon, easterly, and that it failed to get the same completed and in running order to the intersection with the
203 Chicago and North-Western railroad by the first day of January, but did get it in running order and was operating it on and after the first day of April, 1871, about three months, you see, after the time stipulated in the town-meeting resolution or vote. It is further conceded, or if not conceded it is not a disputed fact, certainly, in the case, that a certain Mr. Smith, Mortimer W. Smith I think was his name, was elected supervisor of the town of Oregon, in the spring of 1870; that in the fall of 1870 he was elected a member of the legislature of this state, and on the 31st day of December, just before the time for the session of the legislature to commence, Mr. Smith handed in his resignation to the town clerk of the town of Oregon, addressed to the town clerk, stating therein that he resigned his office as supervisor; that no action was taken by the town authorities, to whom is delegated the authority for filling a vacancy in the case of resignation by the supervisor, until the day before the April town meeting for 1871, when the town clerk and one justice of the peace—there being at that time but one justice of the peace in the county—met together and appointed Doctor E. S. Potter supervisor. He gave his bond and took the oath of office on the day that he was appointed, but the appointment, or order dating the appointment was dated back to the 31st day of December, 1870, and the official bonds of Doctor Potter as supervisor and his oath
204 of office were all dated back to that day and entered in that form upon the town records of the town. It is also in proof, and not denied or disputed, that Dr. Potter was an officer—I think a director —in the Ogle and Carroll County railroad at the time that he received this appointment as supervisor.

Mr. DUTCHER: There is no proof that he was an officer at that time, he was not, in fact, an officer at the time; there is no proof showing he was an officer at the time the bonds were signed; he had resigned.

The COURT: I recollect it was stated that Petrie and Gale, who were present, both of these were the gentlemen who signed his official bonds, were members of the board of directors of this Ogle and Carroll County railroad. These facts, as I said before, are not disputed or called in question as independent and existing facts. It is also conceded that the legislature, at the session of 1869, created another railroad corporation with power to extend a railroad through the county of Ogle, by the name of the Chicago and Iowa railroad, and that some time in the summer of 1870, some kind of contract was entered into between the Ogle and Carroll County Railroad Company and the Chicago and Iowa Railroad Company, by which the interests of the two corporations were substantially blended,
205 made one, although there was a reservation that the consolida-

tion, as such, should not take effect in such a manner as to prevent the Ogle and Carroll County Railroad Company from having the full effect and benefit of this donation, which had been made to it by the town of Oregon, and one or two other towns, which are named. It is also conceded that after the appointment of Doctor Potter as supervisor, and between that time and some time the next day, the town meeting was held, that as such supervisor, together with the town clerk, he signed the bonds in question and the coupons attached to these bonds, which are the coupons now in the suit before you. There is no proof that I can now recall showing or tending to show precisely when these bonds were delivered to this railroad company, or when they were put in circulation by the town of Oregon, whether they were delivered immediately after being signed by Doctor Potter, then acting supervisor, or assuming to act as supervisor, before this town meeting was held, or whether they were retained until after the result of this town meeting, and delivered afterwards, is not disclosed from anything that I recollect now in the testimony. But it does appear that sometime after July, a Mr. Coler, of Champaign, in this state, sold the bonds in question to a Mrs. Jennings for value, and that is conceded by the defendant's counsel, upon the argument, as one of the existing facts in the testimony in the case; that Mrs. Jen-
206 nings delivered the coupons cut from those bonds and now in suit before you, to the present plaintiff, as her attorney and agent to collect the same, and that he brought this suit in his name and is prosecuting it for her benefit and under her direction, she holding the receipt which the attorneys in this suit gave to Mr. Wallace, the present plaintiff, for the coupons now in suit; so that, as I have said before, there are really no disputed facts, as such, in the case. It is claimed, however, on the part of the defendant, that these bonds were issued in violation of the condition which was annexed to the grant or vote, by which the town agreed to their issue, inasmuch as the railroad was not completed by the first day of January, and that they were issued in fraud of the rights of the town by surreptitious appointment, without authority, of Doctor Potter, as supervisor, upon the eve of the expiration of the term of office for that year, and in such haste and at such a time of day and occasion as to indicate a fraudulent intent to circumvent the wishes of the people, and the rights of the people of the town in regard to the issue of these bonds. This is the inference which the defendant would have you draw from the facts surrounding the transaction, with the further statement, however, that they claim that the appointment of Doctor Potter by the board was unauthorized, that is by a single justice of the peace and town clerk, and that therefore it
207 did not amount, as I understand, to even an appointment *de facto*.

With reference then to the first point made, in regard to the ap-

pointment of the supervisor, I shall charge you that under the township organization law, as it stood in this state at the time this transaction took place, the appointment made and entered upon the books of the town, by the town clerk and the only acting justice of the peace in the town at that time, created or rather invested the appointee with the powers and duties of the supervisor *de facto*; that on his accepting the appointment and filing his bond and oath of office, he became invested with the duties of supervisor and that, until he was ousted by judicial process, his acts were binding upon the town, as the supervisor of the town, in the same manner as if he had been duly elected; that strangers dealing with the town, or in its corporate capacity, finding upon the records the entries in due form of law, showing his appointment, would be entitled to be protected in all dealings with him as the proper officer of the town.

With regard to the allegations of fraud, I will pass them by, or rather the allegations that the facts proven authorized you to deduce fraud. I will pass them by, with the single statement that, however that might be the case, if the Ogle and Carroll County Railroad Company were the plaintiff here, and sued on those bonds,

I do not think the testimony in regard to the alleged collusion be-
208 tween the railroad through certain of its officers and directors and the officers of the town, would be such as would bind a third person, unless the proof shows or tends to show that that third person had knowledge of such collusion. So that, in this case, in order to defeat the plaintiff's action, by reason of the alleged fraudulent collusion between the officers of the town and the officers and agents of this railroad company, it must appear clearly to your satisfaction that the plaintiff in this suit, or the owner of these bonds, also was aware of this fraudulent collusion, because persons dealing in the liabilities or undertakings of this class of corporations cannot be bound to look into the secret history of it. It is enough for them to be required to see that the transaction is all right upon its face. Now, when the purchaser of these bonds came to examine the question as to whether they were a legal issue or not, he looked first to the power of the town to issue such bonds. He found that by the law which I have just read to you, these towns were authorized to make such issue of bonds. Then he would be required to look, perhaps, to see that an election was duly held for the purpose of voting upon the question of issuing the bonds; and beyond that I doubt whether a person is bound to take notice of anything in the transaction.

208 If they were delivered contrary to the condition imposed upon the parties by the terms of the vote, such delivery or such vote would not appear upon the face of the bonds themselves; for instance, nothing appears on the face of this bond to show but what it was delivered on the day it bears date.

The record of the town shows that E. S. Potter was supervisor on the day this bond bears date. The records of the town show that he had taken his oath of office and given his official bond at that time, and that therefore he was justified in signing this bond as the supervisor of the town. The records of the town show, to be sure, that these bonds were not to be delivered unless the railroad was constructed by the first day of January, but the purchaser of the bonds would not know that fact upon the face of the bond. They are put upon the general market, and the presumption would be that they were not put in circulation by the officers of the town without the performance on the condition or the waiver of the condition. Time is not held, as a general rule in law, to be the essence of a contract unless expressly made so, and it is always waivable. A party can very readily say, "Well, although you have not fulfilled your contract expressly in regard to time, yet that does not essentially vary the terms of the contract itself, and you have substantially fulfilled it, and therefore you are entitled to your compensation and we give you your bonds," although the railroad may not be in fact completed on the day it was named. The purchaser of
210 bonds is not bound to look into these matters; he is entitled to presume that the officers of the corporation did their duty, and that they did not put the bonds in circulation without either the fact beingperformed according to the conditions of the vote, or that being waived by some action of the people or the authorities. This question was expressly decided, as I said in the late case by the Supreme court of the United States, against Putnam county, where the bonds had been put in circulation before the conditions were performed.

The Supreme court held that a purchaser for value was not bound to look beyond the face of the bonds themselves. This bond bears upon its face the statement that it is issued by the authority of an act of the general assembly of the State of Illinois, entitled, "An Act to amend an Act entitled an Act to incorporate the Ogle and Carroll County Railroad Company," which said act was approved March 30, 1869. Right upon the face of the bond it bears the assertion that it is issued in conformity with the act in question, and it is, therefore incumbent upon the plaintiff, if they would take advantage of the fraud which they have alleged here, to prove that the plaintiff was cognizant of that fraud at the time she purchased the bonds. And I will here say that it is not necessary that this
211 suit should have been brought in the name of Eliza Jennings. The bonds are payable to bearer,and may be sued upon by any person who for the time being is the holder, and although it may appear to you that Mrs. Jennings is the real owner of these bonds, yet if it also appears to you that this suit is prosecuted for her and with her knowledge and consent, that is sufficient to entitle the plaintiff to recover as far as that point is concerned.

The coupons in question are entitled to bear interest from the time of the commencement of this suit. They would be entitled to draw interest from the time that the demand was made, if the demand was shown by the proof, at the rate of 6 per cent. per annum. As there is no specific demand proved, you will be entitled to compute interest from the time this suit was commenced. The papers will show when this suit was commenced.

With these instructions, gentlemen of the jury, the form of your verdict will be: "We, the jury, find the issues for the plaintiff, or defendant, as the case may be, and assess the damages at so much, which will be the amount of the coupons with the interest added; the coupons are nineteen in number at seventy dollars each.

(Endorsed.) Filed Nov. 7, 1885.

WM. H. BRADLEY, *Clerk.*

212 Plaintiff also introduced in evidence certified copy of the notice for and of the record of the election held on the 24th of May, 1869, in the town of Oregon, upon the proposition to issue $50,000 of bonds to the Ogle and Carroll County Railroad Company.

Which said notice for and record of the vote are in the same words and figures as said "Exhibits J and K" attached to the said stipulation dated April 28, 1884, relating to vote taken June 23, 1870, except that the amount proposed to be donated was $50,000 instead of $40,000, and the first division of said railroad was required to be completed by the first day of January, 1870, instead of January 1, 1871, and that the same contained no provision in relation to the release of any prior vote, and that in other respects the conditions of the vote were the same as "Exhibit J," above referred to.

The defendant objected to the introduction of the foregoing certified copy of the notice for and record of the election held May 24, 1869, on the ground that the same was irrelevant and incompetent, which objection the court overruled, to which ruling the defendant then and there excepted, and the same was therefore read in evidence, as hereinbefore stated.

213 The plaintiff's counsel also introduced in evidence a certified copy of the verdict and judgment rendered in the case of *Alexander Wallace* v. *Town of Oregon*, in this court, being the same case referred to in the pleadings and stipulations in this case. The judgment having been rendered on the 29th day of January, 1875, in favor of the plaintiff, for the sum of $1,476.30. Which said certified copy of verdict and judgment are in the words and figures following:

214 UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF ILLINOIS.

Friday, November 6th, A. D. 1874. Present, Hon. Henry W. Blodgett, District Judge.

Alexander Wallace
*vs.*
The Town of Oregon. } *Assumpsit.*

Now come the parties by their attorneys, and upon issue joined thereupon, come a jury of good and lawful men, to wit: Walter L. Johnson, Dennis Putnam, E. I. Collins, John Aynolee, J. C. Wheaton, M. Holland, James B. F. Chesney, James Frisbie, Squire Dutcher, H. A. Packard, Riley S. Palmer and Henry L. Prentiss, who were all duly elected, tried and sworn well and truly to try said issue, and after hearing a part of the evidence, the hour of adjournment having arrived, the further trial is postponed until to-morrow morning.

215 UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF ILLINOIS.

Saturday, November 7th, A. D. 1874. Present, Hon. Henry W. Blodgett, District Judge.

Alexander Wallace
*vs.*
The Town of Oregon. } *Assumpsit.*

Now come again the parties by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing the concluding evidence and the arguments of counsel, and receiving the instructions of the court, the jury retired to consider of their verdict, and after a short absence the jury returned into court the following verdict, to wit: We, the jury, find the issue for the plaintiff and assess his damages to the sum of fourteen hundred and seventy-six dollars and thirty cents. And thereupon the defendant, by its attorney, moves the court for a new trial herein.

216 UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF ILLINOIS.

Friday, January 29th, A. D. 1875. Present, Hon. Henry W. Blodgett, District Attorney.

Alexander Wallace
*vs.*
The Town of Oregon. } *Assumpsit.*

Now come the parties by their attorneys, and now comes on to be heard the motion of the defendant heretofore entered herein for a

new trial of this cause, and after hearing the arguments of counsel the court overrules said motion and awards judgment upon the verdict. It is thereupon considered and adjudged by the court that the plaintiff do have and recover of the defendant the said sum of fourteen hundred and seventy-six dollars and thirty cents, his damages so as aforesaid assessed, together with his costs and charges in this behalf expended, amounting to the sum of two hundred and twenty-four dollars and twenty-five cents.

217 NORTHERN DISTRICT OF ILLINOIS.

I, William H. Bradley, clerk of the Circuit court of the United States for said Northern district of Illinois, do hereby certify the above and foregoing to be true, correct and perfect copies of the orders entered of record November sixth, 1874, November seventh, 1874, and of the judgment entered of record January 29, 1875, in said court, in the cause wherein Alexander Wallace is the plaintiff and the town of Oregon is the defendant, as the same appear from the records of said court now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Chicago in said district this fourth day of November, 1885. WM. H. BRADLEY.

[SEAL.]

218 The plaintiffs' counsel also introduced in evidence the deposition of Eliza Jennings, the plaintiff, which was offered and read in evidence on the said trial of the said case of *Alexander Wallace* v. *Town of Oregon*. The said deposition having been duly taken on the 15th day of September, 1874, before Peter Ambler at Salem, Ohio, which said deposition is in the words and figures following:

219 1st Interrogatory. What is your name, age, occupation and place of residence? Answer. My name is Eliza Jennings; my age is sixty-five years on the 21st day of December; next occupation the same as ladies in general, and my residence is Huntsville, Alabama. 2d Interrogatory. Do you know the parties to this suit or either, and which of them, and how long have you known them respectively? Answer. I knew the plaintiff, Alexander Wallace; I do not know the the defendant; I was never there. 3d Interrogatory. State whether or not you now hold or at any time heretofore you have held any bonds purporting to have been issued by the town of Oregon to the Ogle and Carroll County Railroad Company; if yes, can you give the date, amount and number of such bonds? Answer. I own the bonds that are now in litigation, being bonds to which you refer. The following are the numbers, dates, amounts, and

220 when the same are payable, to wit:

| No. | Date. | Amount. | Payable. |
|---|---|---|---|
| 29 | Dec. 31, 1870. | $1,000.00 | July 1st, 1883. |
| 30 | " " " | 1,000.00 | " " " |
| 31 | " " " | 1,000.00 | " " " |
| 32 | " " " | 1,000.00 | " " " |
| 33 | " " " | 1,000.00 | " " 1884. |
| 47 | " " " | 1,000.00 | " " 1887. |
| 48 | " " " | 1,000.00 | " " " |
| 49 | " " " | 1,000.00 | " " 1888. |
| 50 | " " " | 1,000.00 | " " " |
| 51 | " " " | 1,000.00 | " " " |
| 52 | " " " | 1,000.00 | " " " |
| 53 | " " " | 1,000.00 | " " 1889. |
| 54 | " " " | 1,000.00 | " " " |
| 55 | " " " | 1,000.00 | " " " |
| 56 | " " " | 1,000.00 | " " " |
| 57 | " " " | 1,000.00 | " " 1890. |
| 58 | " " " | 1,000.00 | " " " |
| 59 | " " " | 1,000.00 | " " " |
| 60 | " " " | 1,000.00 | " " " |

And one more not included in the above list, it not having been sent with the others. It is numbered and dated as follows: No. 46, dated Dec. 31st, 1870, amount $1,000, and payable on the 1st day of July, 1887.

221 4th Interrogatory. If in answer to the last interrogatory you state that you have or have had any bonds of the character referred to in that question, will you state when and where and from whom you received them, how you obtained them, whether by purchase or otherwise, and upon what consideration, if any? Answer. I took these bonds on the 1st day of July, 1871, at Champaign, Illinois, from W. N. Coler as part payment of a debt he was owing to me. I took them absolutely at par, in payment of his debt to me, to the amount of the bonds, and he received credit for the whole amount of them absolutely.

5th Interrogatory. State whether or not such bonds, or any of them, had interest coupons attached, if your answer to the foregoing interrogatories is that you have or have had such bonds; and state, also, whether you have ever sold or delivered to the plaintiff in this case any such coupons; and, if yes, state when and where and how many of such coupons were so sold or delivered? Answer.

222 They all had and have interest coupons attached. I delivered the coupons and bonds to Alexander Wallace for collection on my account. They were all deposited in the Van Hyming & Co. bank at Canfield, Ohio. They were taken from there to Chicago, to be used as evidence in this suit. I cannot state the date of their delivery to Mr. Wallace. The coupons delivered were those sued

on, and the other coupons attached to the bonds above described. Alexander Wallace took a receipt from the law firm of Wilkinson, Sackett & Bean, or the attorneys in the case, and I handed this receipt to W. R. Smith, Esq., of Chicago, and he holds the receipt. I do not remember the date. I cannot describe the coupons delivered to him, only that they are the coupons to the foregoing bonds sued on in this case.

6th Interrogatory. If your answer to the foregoing interrogatories, or any of them, is that you have or have had any bonds of the character above referred to, state fully any and all knowledge, information or notice which you had ever received up to and at the time you acquired said bonds, or any of them, further than appeared on the face of the bonds themselves, as to the official char-
223 acter of the persons who executed the same on behalf of the said town, the time or manner of the election or appointment of such persons to their respective offices, and of the time, manner or circumstances attending the issuing of said bonds, or of any claim or pretense of the said town, or any of the officers of said town, that the said bonds, or any of them, were not good and valid securities and binding obligations against said town, issued in good faith and upon a good and valid consideration? Answer. I took these bonds in good faith, believing them to be as good as money for the amount of the face of the bonds. I was assured by W. N. Coler that they were all right, and that I never could have any trouble about them, but could always have the interest when due and the principal at maturity. I never heard anything about the issuing of these bonds, or anything concerning them, until the commencement of the suit now pending, which was long after I had purchased them. I knew nothing about the bonds, except what appeared on their face, except that Mr. Coler,
224 when he sold them to me, told me they were all right, that they were entirely good, and that the interest and principal would be paid promptly, as stated above. I knew nothing about the official character of the persons who executed the bonds on behalf of the town, except what appeared on the face of the bonds; nor did I know anything of the manner of their election or appointment, nor did I know anything of the time, manner or circumstances attending the issuing of the bonds, except as shown by their face; nor did I know of any claim or pretense of the said town or its officers, that the said bonds were not good and valid securities, or that they were not binding on the town, or that they were not issued in good faith and for a valid consideration. On the contrary I understood and believed that they were in every respect good and valid and binding on the town, and had no doubt or suspicion as to them. I bought them believing them to be as represented—all right.

7th Interrogatory. Do you know or can you set forth any other

matter or thing which may be a benefit or advantage to the
225 parties at issue in this cause, or either of them, or that may be material to the subject of this, your examination, or the matters in question in this case. If yes, set forth the same fully and at large in your answer. Answer. I know of nothing further that would affect the matter in any way. ELIZA JENNINGS.

226 The plaintiff's counsel also introduced in evidence, for the purpose of showing the plaintiff to be a *bona fide* purchaser before maturity without notice and for full value of the bonds in controversy, the following depositions: The deposition of Alexander Wallace, duly and properly taken before M. W. Busey, on the 25th day of March, 1884, at Champaign, Illinois.

Deposition of ALEXANDER WALLACE:

Interrogatory 1st. State your name, age, occupation and place of residence? Ans. 1st. My name is Alexander Wallace; my age is sixty-eight, on the 13th day of August next; occupation, dealing in real estate; and my residence at the present time is Urbana, Illinois.

Interrogatory 2nd. State whether you know the parties to this suit, or either of them, and, if so, how long have you known them, or either of them, respectively? Ans. 2d. I know the plaintiff, Eliza Jennings; have known her over fifty years. I do not know the defendant was never there.

Interrogatory 3rd. Did you ever own any of the bonds with interest coupons attached of the town of Oregon, the defendant in this case, payable to the order of the Ogle and Carroll County
227 Railroad Company or bearer, and dated December 31, 1870; and if so, please state when and from whom you acquired the same, and give the number of the bonds, and if you have disposed of said bonds and the interest coupons thereto belonging, please state who now owns the same if you know. Ans. 3rd. I did own five of said bonds, with all the interest coupons belonging to the same. The bonds were all dated December 31, 1870, and were for $1,000 each, payable to the Ogle and Carroll County railroad or bearer. They were numbered 29, 30, 31, 32 and 33. I here produce a copy of said bond No. 31, with a copy of the auditor's certificate on the same, and a sample copy of one of the coupons attached, which I hand to the commissioner and ask him to attach to this deposition. It is marked "Exhibit A" and is signed with my initials "A. W." All the bonds were like this copy of bond No. 31, except the bond No. 33 was made payable July 1, 1884, instead of July 1, 1883, like the other four. To each bond was attached, when I purchased the same, coupons for $70 each, the first one falling due July

1, 1872, and the others every first day of July after that until the maturity of the bonds, which were for the interest on the bonds, each bond bear interest at seven per cent., payable according
228 to the terms of these coupons on the 1st day of July each year.

I bought these bonds and interest coupons from W. N. Coler, of Champaign, Illinois, a dealer in bonds and securities. I paid him in cash for the same at their par or face value, less only the difference between seven per cent. interest, the rate the bonds drew, and ten per cent., the rate money was then worth. I bought them of him about July 1, 1871. All of said five bonds and all the interest coupons belonging to the same are now owned by my sister, Mrs. Eliza Jennings, the plaintiff in this case. I traded them to her for some other bonds which she had.

Interrogatory 4th. If you state you did purchase or acquire such bonds with the interest coupons thereto belonging, please state fully any and all knowledge, information or notice which you have ever received up to and at the time you acquired said bonds, or any of them, further than appeared on the face of the bonds themselves, as to the official character of the persons who executed the same on behalf of said town; the time or manner of the election or appointment of such persons to their respective offices, and of the time, manner or circumstances attending the voting for and issuing said bonds, or of any fraud, illegality or irregularity connected with the voting for making, signing or issuing said bonds, or of any claim or pretense of the said town or any one that the
229 said bonds or any of them were not good and valid securities and binding obligations against said town, issued in good faith and upon a good and valid consideration. Ans. 4th. When I purchased and acquired said bonds and coupons I had no knowledge, information or notice whatever, and had never received any, further than appeared on the face of the bonds themselves, as to the official character of the persons who executed the same on behalf of said town, or of the time or manner of the election or appointment of such persons to their respective offices, or of the time, manner or any of the circumstances or conditions attending the voting for and issuing of said bonds and interest coupons, or any of them, or of any fraud, illegality or irregularity connected with the voting for, making, signing or issuing of said bonds and interest coupons, or any of them, or of any pretense of the said town or any one that said bonds and interest coupons, or any of them, were not good and valid securities and binding obligations against said town of Oregon (the defendant in this case), issued in good faith and upon a good and valid consideration. The bonds were represented to me by Mr. Coler to be good bonds, and I bought them as such in good faith, having no doubt in my mind but that the bonds and coupons

230 would be paid. I never knew when the Ogle and Carroll county railroad or when the Chicago and Iowa railroad was completed, and I never knew that there had been a consolidation of the two roads; and when I bought said bonds and coupons I had no notice or knowledge that the Ogle and Carroll county railroad had not been fully completed and equipped and in running order on or before the first day of January, 1871, with trains of passenger and freight cars running over the same from a connection or intersection with the Chicago and North-Western railroad to the east bank of Rock river, opposite the town of Oregon, or to a point within one-half mile of the said east bank of the river, or that the same was not so completed with a T rail weighing not less than 45 lbs. to the yard, or that the same was not equipped by that time with rolling stock sufficient to operate a daily train to and from said town for the accommodation of passengers and freight. Nor did I have any knowledge or notice that any of the matters or things stated in the defendant's second plea filed in this case (a copy of all of which plea I have seen), had not been fully performed and complied
231 with by said Ogle and Carroll County Railroad Company before the date of the bonds, Dec. 31st, 1870, or before Jan. 1st, 1871, or that any conditions annexed to the vote of the bonds had not been fully performed when and as it should be. I was absolutely an innocent purchaser for value of said bonds and coupons, and without any notice whatever of any of the matters set up in said plea as a defense. ALEXANDER WALLACE.

"EXHIBIT A."

232 Signed with my initials "A. W."

UNITED STATES OF AMERICA, STATE OF ILLINOIS, COUNTY OF OGLE.

No. 31. $1,000.

*Oregon Town Bond.*

*Know all men by these presents:* That the town of Oregon, in the county of Ogle, and State of Illinois, is indebted to the Ogle and Carroll County Railroad Company, in the full and just sum of one thousand dollars, which sum of money said town agrees and promises to pay on or before the first day of July, 1883, to the said Ogle and Carroll County Railroad Company, or bearer, with interest at the rate of seven per cent. per annum, payable annually on the first day of July, at the office of the Farmers' Loan and Trust Company of New York, in the city of New York, upon the delivery of the coupons severally hereto annexed, for which payment of principal and
233 interest, well and truly to be made, the faith, credit and property of the said town of Oregon, and hereby solemnly pledged under

authority of an act of the General Assembly of the State of Illinois, entitled, "An act to amend an act entitled an act to incorporate the Ogle and Carroll County Railroad Company," which said act was approved March 30, A. D. 1869.

This bond is one of a series numbering from 21 to 60, inclusive, for $1,000 each, which bonds so numbered, together with another series numbering from 1 to 20, inclusive, for $500 each, are the only bonds issued by said town of Oregon, under and by virtue of said act.

In witness whereof, the supervisor and town clerk of the said town of Oregon have hereunto set their hands, this thirty-first day of December, A. D. 1870. E. S. POTTER, *Supervisor.*

FRED. H. MARSH, *Town Clerk.*

COPY OF ONE OF THE COUPONS ATTACHED TO SAID BOND.

STATE OF ILLINOIS, COUNTY OF OGLE.

The town of Oregon will pay to the Ogle and Carroll County Railroad Company, or bearer, seventy dollars, at the office of
234 the Farmers Loan and Trust Company of New York, in the city of New York, on the first day of July, 1880, on presentation, being one year's interest on Bond No. 31.

F. H. MARSH, *Clerk.* E. S. POTTER, *Supervisor.*

COPY OF AUDITOR'S CERTIFICATE ON BACK OF SAID BOND.

AUDITOR'S OFFICE, ILLINOIS. SPRINGFIELD, June 5, 1871.

I, Charles E. Lippincott, Auditor of Public Accounts of the State of Illinois, do hereby certify that the within bond has been registered in this office this day, pursuant to the provisions of an act entitled "An act to fund and provide for paying the railroad debts of counties, townships, cities and towns," in force April 16, 1869.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of my office, the day and year aforesaid.

[SEAL.] C. E. LIPPINCOTT, *Auditor P. A.*

235 Also the deposition of William Wallace, duly and properly taken on the 24th day of March, 1884, before E. G. Johnson, at Elyria, State of Ohio. Which said deposition is as follows:

Deposition of WM. S. WALLACE:

Interrogatory 1st. State your name, age, place of residence and occupation? Ans. My name is William S. Wallace; I am forty-nine years of age; I am a farmer by occupation, and I reside at Elyria, Lorain county, Ohio.

Interrogatory 2d. State whether you know the parties to this suit, or either of them; and if so, how long have you known them respectively? Ans. I know the plaintiff, Eliza Jennings; she is my sister; I have known her always; I do not know the defendant except by reputation.

Interrogatory 3d. Did you ever purchase any of the bonds with the interest coupons attached of the town of Oregon, the de-
236 fendant in this case, payable to the Ogle and Carroll County Railroad Company or bearer, and dated December 31, 1870; and if so, please state when and from whom, and how you acquired the same; give a description of such bonds, especially the numbers of the same, and whether any of the interest coupons belonging to such bonds are a part of the coupons sued on in this case? Ans. I did purchase some of said bonds with all interest coupons attached, on or about March 1, 1872, and they are of the date, amount, and payable as follows: The bonds are all dated December 31st, 1870, and are each of the amount of one thousand dollars, and are numbered respectively 34, 35, 36 and 37, making four bonds of one thousand dollars each. I purchased said bonds of W. N. Coler, and paid him in money therefor. I paid one thousand dollars in cash for each of said bonds, making four thousand dollars in all; said bonds all had interest coupons attached; the 1st fell due July 1st, 1872, and one of each bonds fell due every first day of July thereafter until the maturity of the bonds. The coupons are for
$70 each, and the rate of interest on said bonds was seven per
237 cent. per annum.

The following interest coupons from said bonds are embraced in this suit.

4 coupons due July 1st, 1873.
4 coupons due July 1st, 1874.
4 coupons due July 1st, 1875.
4 coupons due July 1st, 1876.
4 coupons due July 1st, 1877.
4 coupons due July 1st, 1878.
4 coupons due Jnly 1st, 1879.
4 coupons due July 1st, 1880.

The coupons falling due July 1st, 1872, were paid in New York at maturity, as I supposed, at least I got the money on them from said Coler when due. I sold said bonds to my sister, Mrs. Eliza Jennings, and she is now the owner thereof, including all the said coupons issued with or belonging to said bonds, except the coupons due July 1st, 1872. I received from Mrs. Jennings in consideration for said bonds and coupons, so sold to her by me, other bonds of an equal amount and value.

Fourth interrogatory. If you state you did purchase or acquire such bonds with the interest coupons attached thereto belonging,

please state fully any and all knowledge, information or notice
238 which you had ever received up to and at the time you acquired said bonds or any of them further than appeared on the face of the bonds themselves as to the official character of the persons who executed the same on behalf of said town, the time or manner of the election or appointment of such persons to their respective offices, and of the time, manner or circumstances attending the voting for and issuing of said bonds, or of any fraud, illegality or irregularity connected with the voting for, making, signing or issuing of said bonds, or any of them, or of any claim or pretense of said town, or of any one that said bonds or any of them were not good and valid securities and binding obligations against said town issuing in good faith and upon a good and valid consideration? Ans. I purchased said bonds of said W. N. Coler in good faith, believing them to be as good as the gold for the amount thereof, and all interest coupons attached thereto as they fell due; Coler said they were all right and were a good and safe investment; I never heard anything about the issuing of these bonds or any thing concerning them until the commencement of a suit by my brother, Alexander Wallace, to collect coupons, which was long after I purchased
239 them; I knew nothing about the bonds except what appeared on their face and which Mr. Coler told me as above stated; I knew nothing about the official character of the persons who executed the bonds on behalf of the defendant, except what appeared on the face of the bonds; nor did I know anything of the time or manner of their election or appointment; nor did I know anything of the time or circumstances attending the issuing of the bonds except as shown on the face of the bonds; nor did I know of any claim or pretense of the said town of Oregon or its officers that the said bonds were not good and valid securities, or *that they were not good and valid securities*, or that they were not binding on the town, or that they were not issued in good faith and for a valid consideration. On the contrary I was told and believed that they were, in every respect, good, valid and binding securities on the town, and had no doubt or suspicion as to them; I bought them in good faith; I knew nothing of the time or manner of voting for said bonds, or of any of them, or of any fraud or illegality connected with the voting for, making, signing or issuing the same; nor of any claim or pretense of said town or of any one else, that said bonds or any of them
240 were not good and valid and lawful securities issued in good faith, upon a good and valid consideration.

Interrogatory fifth. Please state any other matter or thing within your knowledge of benefit or advantage to the plaintiff in this case the same as though you had been particularly interrogated in reference thereto? Ans. A copy of the defendant's second plea in this case has been handed me, in which the defendant states in sub-

stance, among other things, that these bonds were voted upon condition that the Ogle and Carroll County Railroad should have completed on or before January 1, 1871, the first division of its road, with a T rail weighing not less than forty-five pounds to the yard, in condition to run trains thereon from a connection or intersection with the Chicago and North-Western railway, to a point at and within said town of Oregon, within one-half mile of the east bank of Rock river, and should have equipped the same with rolling stock sufficient to operate a daily train to and from said town, for the accommodation of passengers and freight, and that the first division of
241 said railroad should commence on the east bank of Rock river, opposite the town of Oregon, in the county of Ogle, and should run from thence on the most available route to a connection with the Chicago and North-Western railway, or with any other railway leading to the city of Chicago. When I purchased and acquired said bonds and coupons, I had no knowledge, information or notice that said Ogle and Carroll County Railroad Company had not on or before January 1, 1870, completed the first division of its road, or that the same was not so completed with a T rail weighing not less than forty-five pounds to the yard, or that the same was not so completed in condition to run trains thereon from a connection with the Chicago and North-Western railway to a point at and within said town of Oregon, within one-half mile of the east bank of Rock river, or that said road was not within that time equipped with rolling stock sufficient to operate a daily train to and from said town for the accommodation of passengers and freight. Nor did I have before I purchased and acquired said bonds and coupons any knowledge or notice that said Ogle and Carroll County railroad
242 had been consolidated with the Chicago and Iowa Railroad Company, or that there had been any neglect or failure by the said Ogle and Carroll County Railroad Company to comply with any of the conditions, stipulations, agreements or understanding, upon which said bonds were voted, or with any of the conditions set up in such plea, nor did I know that said bonds had been voted upon any conditions whatever. I did not know when the said Ogle and Carroll County railroad, or the said Chicago and Iowa railroad completed either the first division, or any other division, but I supposed when I bought the bonds that all conditions, if any existed, had been complied with. The bonds bore the certificate of the auditor of the State of Illinois that they had been registered in his office, and the bonds on their face stated substantially that they had been issued under authority of and by virtue of an act of the legislature of the State of Illinois.

I did not consider I was bound to investigate and see whether these sworn officers had certified to falsehoods; I thought I had a right to rely upon the bonds, being under the circumstances

243 what Mr. Coler represented them to be, namely, good and safe investments.

When I sold these bonds and coupons to my sister, Mrs. Jennings, she gave me in exchange an equal amount of other bonds. I do not know anything personally about the town of Oregon. I never was there in my life. WILLIAM S. WALLACE.

244 Also the deposition of the plaintiff, Eliza Jennings, taken on the 17th day of March, 1884, before E. S. Johnson, at Elyria, Ohio, which said deposition is as follows:

Deposition of ELIZA JENNINGS:

Interrogatory first. State your name, age, occupation and place of residence? Ans. My name is Eliza Jennings; my age is seventy-four years on the 21st day of December, A. D. 1883; no occupation, and I now live at Elyria, Ohio.

Interrogatory second. State whether you know the parties to this suit, or either of them; and if so, how long have you known them respectively? Ans. I am the plaintiff. I do not know the defendant except by reputation.

Interrogatory third. Did you ever purchase or acquire any of the bonds with interest coupons attached of the town of Oregon, the defendant in this case, payable to the order of Ogle and Carroll County Railroad Company or bearer, and dated December 31,

245 1870; and if so, please state where and from whom and how you acquired the same, and give a description of such bonds and coupons? Ans. I did acquire some of said bonds with interest coupons attached and dated December 31, 1870, and they are of the date, amount and payable as follows: The bonds are all dated December 31, 1870, are each of the amount of one thousand dollars, and are numbered respectively from 46 to 60, both inclusive, making fifteen bonds of one thousand dollars each; Nos. 46, 47 and 48, payable July 1, 1887; Nos. 49, 50, 51 and 52 are payable July 1, 1888; Nos. 53, 54, 55 and 56 are payable July 1, 1889; Nos. 57, 58, 59 and 60 are payable July 1, 1890; each coupon was of the amount of seventy dollars. The first coupons fell due July 1, 1872, and the others one every year on each bond each first of July thereafter until maturity of the bonds.

The rate of interest on said bonds was seven per cent., and I purchased all the coupons belonging to each bond at the time I purchased and acquired the bonds. I took said bonds and coupons on the first day of July, 1871, at Champaign, Illinois, from W. N. Coler, as part payment of a debt he was owing me. I took them absolutely at par in payment of his debt to me, to the amount of the bonds, and he received credit for the whole amount of them absolutely. I still own all of said bonds and coupons. I afterwards

246 purchased of my brother, Alexander Wallace, five of said bonds, numbered 29, 30, 31, 32 and 33, of one thousand dollars each, and all having similar interest coupons attached. I also purchased of my brother, William S. Wallace, four of said bonds, numbered 34, 35, 36 and 37, with similar interest coupons attached, and I still own all of them.

On the bonds first purchased by me of W. N. Coler, the coupons that are now due and unpaid, and embraced in this suit, are as follows:

| | | | | | | |
|---|---|---|---|---|---|---|
| 15 | coupons of | $70 | each, due | July | 1st, | 1873 |
| 15 | " | 70 | " | " | " | 1874 |
| 15 | " | 70 | " | " | " | 1875 |
| 15 | " | 70 | " | " | " | 1876 |
| 15 | " | 70 | " | " | " | 1877 |
| 15 | " | 70 | " | " | " | 1878 |
| 15 | " | 70 | " | " | " | 1879 |
| 15 | " | 70 | " | " | " | 1880 |
| 1 | " | 70 | " | " | " | 1872 |

Other coupons have fallen due since July 1, 1880, but are not involved in this suit.

On the bonds I purchased of my brother, William S. Wallace, the coupons that are now due and payable, and embraced in this suit, are as follows:

| | | | | | | |
|---|---|---|---|---|---|---|
| | 4 | coupons of | $70 | each, due | July | 1st, 1872 |
| | 4 | " | 70 | " | " | " 1873 |
| | 4 | " | 70 | " | " | " 1874 |
| | 4 | " | 70 | " | " | " 1875 |
| 247 | 4 | " | 70 | " | " | " 1876 |
| | 4 | " | 70 | " | " | " 1877 |
| | 4 | " | 70 | " | " | " 1878 |
| | 4 | " | 70 | " | " | " 1879 |
| | 4 | " | 70 | " | " | " 1880 |

On the bonds I purchased of my brother, Alexander Wallace, the coupons that are due and embraced in this suit are as follows:

| | | | | | | |
|---|---|---|---|---|---|---|
| 5 | coupons of | $70 | each, due | July | 1st, | 1873 |
| 5 | " | 70 | " | " | " | 1874 |
| 5 | " | 70 | " | " | " | 1875 |
| 5 | " | 70 | " | " | " | 1876 |
| 5 | " | 70 | " | " | " | 1877 |
| 5 | " | 70 | " | " | " | 1878 |
| 5 | " | 70 | " | " | " | 1879 |
| 5 | " | 70 | " | " | " | 1880 |

My present suit embraces all of the foregoing coupons, and I am now the owner of all of them, as well as of the bonds to which they are attached.

Interrogatory fourth. If you state that you did purchase or acquire such bonds with the interest coupons thereto belonging, please state fully any and all knowledge, information or notice which you had ever received up to and at the time you acquired
248 said bonds or any of them, further than appeared on the face of the bonds themselves as to the official character of the persons who executed the same on behalf of said town, the time or manner of the election or appoinment of such persons to their respective office and of the time and manner or circumstances attending the voting for and issuing of said bonds, or of any fraud, illegality or irregularity connected with the voting for, making, signing or issuing of said bonds or of any claim or pretense of the said town or any one that said bonds or any of them were not good and valid securities, and binding obligations against said town, issued in good faith and upon a good and valid consideration? Answer. I took the fifteen bonds from W. N. Coler in good faith, believing them to be good as the money for the amount of the face of said bonds. I was told by Mr. Coler that they were all right and that I would never have any trouble about them, but could always have the interest when due and the principal at maturity. I never heard any thing about the issuing of these bonds or anything concerning them, until the commencement of a suit by my brother, Alexander Wallace, to collect coupons, which was long after I purchased
249 them. I knew nothing about the bonds except what appeared on their face, except that Mr. Coler told me when he sold them to me that they were all right, that they were entirely good and that the interest and principal would be paid promptly at maturity when due; I knew nothing about the official character of the persons who executed these bonds on behalf of the defendant, except what appeared on the face of the bonds, nor did I know anything of the time or manner of their election or appointment, nor did I know anything of the time, manner or circumstances attending the issuing of the bonds except as shown on their face, nor did I know of any claim or pretense of the said town or its officers that the said bonds were not good and valid securities, or that they were not binding on the town, or that they were not issued in good faith and for a valid consideration; on the contrary I understood that they were in every respect good, valid and binding on the town, and had no doubt or suspicion as to them; I bought them believing them as represented, all right; I knew nothing of the time or manner of voting for said bonds, or of any fraud or illegality connected
250 with the voting for, making, signing or issuing of the same, nor of any claim or pretense of said town or of any one else that said bonds or any of them were not good and valid and lawful securities issued upon a good and valid consideration; when I purchased bonds of my brothers I knew no more about them, except that the town refused to pay, and it was necessary to bring suit.

Interrogatory fifth. Please state any other matter or thing within your knowledge of benefit or advantage to the plaintiff in this case, the same as thought you had been particularly interrogated in reference thereto. Ans. I attach hereto as a part of my answer and mark it "Exhibit A" a copy of one of the bonds; all the bonds are alike, except as to the date of maturity. A suit was brought on the first coupons, due July 1, 1872, from nineteen of the bonds, viz.: from bonds 29, 30, 31, 32 and 33, and 47 to 60 both inclusive, in the name of my brother, Alexander Wallace, in the Circuit court of the United States for the Northern district of Illinois some years ago, and judgment rendered against the town. I know nothing further. ELIZA JENNINGS.

251 "EXHIBIT A."

UNITED STATES OF AMERICA, STATE OF ILLINOIS, COUNTY OF OGLE.

No. 37. $1,000.

*Oregon Town Bond.*

Know all men by these presents that the town of Oregon, in the county of Ogle and State of Illinois, is indebted to the Ogle and Carrol County Railroad Company in the full and just sum of one thousand dollars, which sum of money said town agrees and promises to pay on or before the first day of July, 1885, to the said Ogle and Carroll County Railroad Company, or bearer, with interest at the rate of seven per cent. per annum payable annually on the first day of July at the office of the Farmers' Loan and Trust Company of New York, in the city of New York, upon the delivery of the coupons severally hereto annexed, for which payment of principal and interest well and truly to be made the faith, credit and property of the said town of Oregon are hereby solemnly pledged under authority of an act of the General Assembly of the State of Illinois, entitled "An act to amend an act entitled an act to incorporate the Ogle and Carroll County Railroad Company," which said act was approved March 30, A. D. 1869.

This bond is one of a series numbering from 21 to 60 inclusive, for $1,000 each, which bonds so numbered together with
252 another series numbering from 1 to 20 inclusive, for $500 each, are the only bonds issued by said town of Oregon, under or by virtue of said act.

In witness whereof, the supervisor and town clerk of the said town of Oregon have hereunto set their hands this 31st day of December, A. D. 1870.

E. S. POTTER, *Supervisor.*
FRED H. MARSH, *Town Clerk.*

COPY OF ONE OF THE COUPONS ATTACHED TO SAID BOND.

State of Illinois, county of Ogle, town of Oregon, will pay to the Ogle and Carroll County Railroad Company or bearer seventy dollars at the office of the Farmers' Loan and Trust Company of New York, in the city of New York, on the first day of July, 1880, on presentation, being one year's interest on said bond—No. 37.

E. S. POTTER, *Supervisor.*
F. H. MARSH, *Town Clerk.*

COPY OF THE AUDITOR'S CERTIFICATE ON THE BACK OF SAID BOND.

AUDITOR'S OFFICE, ILLINOIS. SPRINGFIELD, June 5, 1871.

I, Charles E. Lippincott, auditor of public accounts of the State of Illinois, do hereby certify that the within bond has been registered in this office this day pursuant to the provisions of an act entitled, "An act to fund and provide for paying the railroad debts of counties, townships, cities and towns," in force April 16, 1869.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of my office the day and year aforesaid.

[SEAL.] C. E. LIPPINCOTT, *Auditor P. A.*

253 The plaintiff also introduced another deposition of the plaintiff, taken subsequently, on the 25th day of March, 1884, before E. G. Johnson, at Elyria, Ohio, which deposition is as follows:

Deposition of ELIZA JENNINGS:

First Interrogatory. Are you the plaintiff in this suit, and have you already given a deposition therein? Ans. I am the plaintiff in this suit, and I have already given a deposition therein.

Second Interrogatory. At the time you purchased the bonds of the town of Oregon, which you say in your prior deposition taken in this case, you purchased, did you know or had you any notice that the first division of the Ogle and Carroll County railroad was not completed from a connection or intersection with the Chicago and North-Western railway to a point at and within the town of Oregon within one-half mile of the east bank of Rock river, by or before the first day of January, 1871, or that said railroad was
254 not so completed by said time with a "T" rail, weighing not less than forty-five pounds to the yard, or that said railroad was not so completed by said time in condition to run trains thereon from a connection or intersection with the Chicago and North-Western railway to a point at and within one-half mile of the east bank of Rock river, or that the same was not so completed and equipped with rolling stock sufficient to operate a daily train to and from said town for the accommodation of passengers and freight by or before

January first, 1871? State fully and particularly what knowledge, if any, you had in relation to said railroad, or the railroad of the Chicago and Iowa Railroad Company or that said two railroads had ever consolidated. Ans. When I purchased and acquired said bonds and coupons or any of them, I had no knowledge, information or notice that said Ogle and Carroll County Railroad Company had not on or before January 1, 1870, completed the first division of its road or that the same was not so completed with a "T" rail,
weighing not less than forty-five pounds to the yard; or that
255 the same was not so completed and in condition to run trains
thereon from a connection with the Chicago and North-Western railway to a point at and within said town of Oregon, within one-half mile of the east bank of Rock river, or that said road was not within that time equipped with rolling stock sufficient to operate a daily train to and from said town for the accommodation of passengers and freight; nor did I have before I purchased and acquired said bonds and coupons, or any of them, any knowledge or notice that said Ogle and Carroll County railroad had been consolidated with the Chicago and Iowa Railroad Company, or that there had been any neglect or failure by the said Ogle and Carroll County Railroad Company to comply with any of the conditions, stipulations or agreements or understandings upon which said bonds were voted, or with any of the conditions mentioned in the interrogatory; nor did I know, indeed, that said bonds had been voted upon any conditions whatever. I did not know when the said Ogle and Carroll County railroad or the said Chicago and Iowa railroad was
completed, either the first division or any other, but I supposed
256 when I bought the bonds that all the conditions, if any existed,
had been fully complied with. The bonds bore the certificate of the auditor of State of Illinois, that they had been registered in his office, and the bonds on their face stated substantially that they had been issued under authority of, and by virtue of, an act of the legislature of the State of Illinois; I did not consider it necessary for my protection to look further in respect to them. I thought I had a right to rely upon them, especially as Mr. Coler said they were all right, and recommended them so highly to me. I had no knowledge, whatever, of said railroad, or the railroad of the Chicago and Iowa Railroad Company, or that said two railroads had been consolidated. I never was at the town of Oregon in my life and know nothing about it, except that I hold and own these bonds and coupons. ELIZA JENNINGS.

257 The plaintiff also offered in evidence the original supervisor's book of the town of Oregon, in use from 1869 to the present time, containing among other things the list of the $10,000 of bonds, voted to the Ogle and Carroll County railroad, Dec. 6, 1869, and the

accounts of the supervisor with the town, and also the following on pages 264 to 301 inclusive:

258 List of bonds of the town of Oregon, in the county of Ogle, and State of Illinois, issued to the Ogle and Carroll County Railroad Company, in pursuance of an election held by the legal voters of said town, on the 23d day of June, A. D. 1870, under the provisions of an act of the general assembly of the State of Illinois, entitled "An act to amend an act entitled 'an act to incorporate the Ogle and Carroll County Railroad Company'," which said act was approved on the 30th day of March, A. D. 1869.

| BONDS. | | | | | COUPONS ATTACHED. | | | | Remarks. |
|---|---|---|---|---|---|---|---|---|---|
| No. | Date. | Amount. | When Due. | Where Payable. | No. | Amount. | When Due. | Where Payable. | |
| 21 | | $1,000.00 | July 1, 1881. | Farm'rs Loan & Trust Co., N. Y. | 2 | 70.00 | July 1, 1872. | Farm'rs Loan & | |
| | | | | | 3 | 70.00 | " 1, 1873. | Trust Co., N. Y. | |
| | | | | | 4 | 70.00 | " 1, 1874. | " " " | |
| | | | | | 5 | 70.00 | " 1, 1875. | " " " | |
| | | | | | 6 | 70.00 | " 1, 1876. | " " " | |
| | | | | | 7 | 70.00 | " 1, 1877. | " " " | |
| | | | | | 8 | 70.00 | " 1, 1878. | " " " | |
| | | | | | 9 | 70.00 | " 1, 1879. | " " " | |
| | | | | | 10 | 70.00 | " 1, 1880. | " " " | |
| | | | | | 11 | 70.00 | " 1, 1881. | " " " | |
| 22 | | $1,000.00 | July 1, 1881. | Farm'rs Loan & Trust Co., N. Y. | 1 | 35.00 | July 1, 1871. | Farm'rs Loan & | |
| | | | | | 2 | 70.00 | " 1, 1872. | Trust Co., N. Y. | |
| | | | | | 3 | 70.00 | " 1, 1873. | " " " | |
| | | | | | 4 | 70.00 | " 1, 1874. | " " " | |
| | | | | | 5 | 70.00 | " 1, 1875. | " " " | |
| | | | | | 6 | 70.00 | " 1, 1876. | " " " | |
| | | | | | 7 | 70.00 | " 1, 1877. | " " " | |
| | | | | | 8 | 70.00 | " 1, 1878. | " " " | |
| | | | | | 9 | 70.00 | " 1, 1879. | " " " | |
| | | | | | 10 | 70.00 | " 1, 1880. | " " " | |
| | | | | | 11 | 70.00 | " 1, 1881. | " " " | |
| 23 | | $1,000.00 | July 1, 1881. | Farm'rs Loan & Trust Co., N. Y. | 2 | 70.00 | July 1, 1872. | Farm'rs Loan & | |
| | | | | | 3 | 70.00 | " 1, 1873. | Trust Co., N. Y. | |
| | | | | | 4 | 70.00 | " 1, 1874. | " " " | |
| | | | | | 5 | 70.00 | " 1, 1875. | " " " | |
| | | | | | 6 | 70.00 | " 1, 1876. | " " " | |
| | | | | | 7 | 70.00 | " 1, 1877. | " " " | |

259 Here follows in said registration pages 266 to 301 of said supervisor's book inclusive, containing a similar registration of the bonds numbered 24 to 60 inclusive, and no signature of any officer appears signed to said registration or caption thereto, nor is there any signature to the registration of the other bonds registered in said book To which counsel for defendant objected upon the ground that the said registration and the caption thereto was not signed by, nor did it appear to be made by the supervisor or any officer of the town of Oregon, authorized by law to make the same in behalf of the town; and also objected to the introduction of the caption to said registration upon the ground that there was no law authorizing any such caption or statement to be made in connection with the registration of said bonds; which objection the court overruled; to which the defendant then and there excepted, and the same was read in evidence as hereinbefore stated.

Plaintiff also offered in evidence a certified copy of the following paper transmitted to and filed in the office of the auditor of public accounts of the State of Illinois, June 5, 1871.

260 No. 5.

STATE OF ILLINOIS, }
COUNTY OF OGLE, }

April 1, 1871.

*To the Auditor of Public Accounts of the State of Illinois.*

SIR: I hereby certify that the following described bonds are entitled to registration in your office under the provisions of an act entitled "An act to fund and provide for paying the railroad debts of counties, townships, cities and towns," in force April 16, 1869, the bonds being numbered:

261

| | | | |
|---|---|---|---|
| From No. 21 to No. 24 incl. for $1,000 each, dated | Dec. 31, 1870 | and payable | July 1, 1881. |
| From No. 25 to No. 28 incl. for $1,000 each, dated | " 31, 1870 | and payable | " 1, 1882. |
| From No. 29 to No. 32 incl. for $1,000 each, dated | " 31, 1870 | and payable | " 1, 1883. |
| From No. 33 to No. 36 incl. for $1,000 each, dated | " 31, 1870 | and payable | " 1, 1884. |
| From No. 37 to No. 40 incl. for $1,000 each, dated | " 31, 1870 | and payable | " 1, 1885. |
| From No. 41 to No. 44 incl. for $1,000 each, dated | " 31, 1870 | and payable | " 1, 1886. |
| From No. 45 to No. 48 incl. for $1,000 each, dated | " 31, 1870 | and payable | " 1, 1887. |
| From No. 49 to No. 52 incl. for $1,000 each, dated | " 31, 1870 | and payable | " 1, 1888. |
| From No. 53 to No. 56 incl. for $1,000 each, dated | " 31, 1870 | and payable | " 1, 1889. |
| From No. 57 to No. 60 incl. for $1,000 each, dated | " 31, 1870 | and payable | " 1, 1890. |

being in all forty bonds amounting to $40,000 and bearing interest at the rate of seven per cent. per annum, payable annually on the first day of July. These bonds are issued by the town of Oregon in the county of Ogle and State of Illinois, to the Ogle and Carroll County Railroad Company, under and by authority of the provisions of an act to amend an act entitled "An act to incorporate the Ogle
262 and Carroll County Railroad Company." Approved March 30, 1869, and by a vote of the people of said town at an election held on the 23d day of June, 1870. And I as supervisor of said town do hereby certify that all the preliminary conditions in the act "in force April 16, 1869," required to be done to authorize the registration of these bonds and to entitle them to the benefits of said act last referred to, have been fully complied with to the best of my knowledge and belief.

ELIAS S. POTTER,
*Supervisor of the town of Oregon, Illinois.*

Subscribed and sworn to by the said Elias S. Potter, before me this first day of April, A. D. 1871.

JAMES H. CARTRIGHT, [SEAL.]
*Justice of the Peace.*

Endorsed. Filed June 5, 1871.

C. E. LIPPINCOTT,
*Auditor of Public Accounts.*

AUDITOR'S OFFICE, ILLINOIS. SPRINGFIELD, March 15, 1884.

I, Charles P. Swigert, auditor of public accounts of the State of Illinois, do hereby certify that the foregoing and annexed instrument is a true, full and correct copy of certificate of Elias S. Potter, as supervisor of Oregon township (Ogle county), in relation to
263 registration of bonds issued by said township to the Ogle and Carroll County Railroad Company, together with the endorsements thereon, now on file in and forming part of the records of this office.

In testimony whereof, I hereunto subscribe my name and affix the seal of my office at Springfield, the day and year above written.

[SEAL.] CHAS. P. SWIGERT,
*Auditor of Public Accounts.*

To which counsel for defendant objected, upon the ground (1) that said certificate bears date and purports to have been sworn to April 1, 1871, two days before said E. S. Potter had any color of appointment to the office of supervisor, and does not appear to have been transmitted to or filed in the office of the state auditor until June 5, 1871, and nearly two months after George M. Dwight was elected and qualified supervisor of said town, as appears from the evidence and the stipulation of the parties.

(2) That the certificate on its face appears to have been made upon "the best knowledge and belief" of said Potter, and it
264 does not state positively that the matters therein stated are true.

(3) That said certificate is otherwise incompetent and irrelevant.

The court admitted the said certificate in evidence subject to said objections for the present, at the same time stating that the presumption is that the certificate was made and sworn to on the date it bears date, April 1, 1871; and that, unless it was made to appear by other evidence that it was, in fact, made and sworn to after Potter received his appointment, it could not be regarded as the act of the supervisor of the town, and would not be evidence against the town.

To which ruling of the court the defendant then and there excepted, and the same was read in evidence, as hereinbefore stated.

265 GEORGE M. DWIGHT, a witness, was then called on behalf of the plaintiff, who being first duly sworn, was examined in chief by Mr. Packard and testified as follows:

Q. What is your name? A. George M. Dwight. Q. Where do you reside? A. Oregon, Illinois. Q. You were supervisor of the township of Oregon during a portion of the year 1871, were you not? A. Yes; I was elected in April, 1871. Q. When you received the supervisor's book, which has been introduced in evi-

dence here, did it contain this registration of bonds in litigation here, this $40,000 of bonds, voted to the Ogle and Carroll County Railroad Company, in June, 1870? A. I think it did, sir.

*Cross-Examination by Gen. Edsall.*

Q. Do you remember when you first received that book, Mr. Dwight? A. I had a little trouble to find that book, and my recollection is that I got hold of that book just previous to the meeting of the town board, in September. Q. In September, 1871? A. Yes, sir. Q. You were elected supervisor in April, 1871? A. Yes, sir. Q. And you did not get hold of that book until just before the meeting of the board of town auditors? A. Yes, sir. Q. That is what it was called, I believe? A. Yes, sir. Q. In September, 1871? A. Yes, sir. Q. Do you remember where you found that book when you did get hold of it? A. I found it in
Mr. Cartwright's office. Q. He was the attorney for the
266 Chicago and Iowa Railroad Company? A. Yes, sir. Q. One of these men that was referred to yesterday as appointing Potter supervisor? A. Yes, sir. Q. Did you ever examine the registration of this $40,000 of bonds that you found in that book to notice in whose handwriting the registration was? A. I would not know the handwriting; I understood it was Cartwright's handwriting, but I could not swear to it. Q. I will ask you if you ever authorized Cartwright to make any registration of the bonds in the supervisor's book? A. No, sir. Q. Did you know that any such registration had been made in that book until you got hold of the book in September, 1871? A. No, sir. Q. Then you found what there is there now in that book? A. Yes, sir. Q. And you never authorized it to be put there? A. No, sir. Q. And you were supervisor, as I understand you, from the time you qualified shortly after the election in April, 1871, for the next year and for a year or two afterwards? A. Until the spring of 1875, I think. Q. Do you remember the date when you qualified? A. Yes, it was somewhere about that—April 10, 1871—about a week after the election. Q. The stipulation is that you were elected April 4, 1871, and filed your bond and qualified on the 10th of April, 1871, which I understand is the fact. Assuming that to be so, did you ever make or send to the auditor of public accounts of the State of Illinois any certificate to procure the registration of those bonds? A. No, sir. Q. Did you ever authorize anybody to make or send such a certificate for you officially? A. No, sir. Q. Did
you ever know anything about any such certificate being made
267 or transmitted to the auditor of public accounts? A. No, sir. Q. You had no knowledge of it? A. I had no knowledge of any such thing.

*Re-direct Examination by Mr. Packard.*

Q. You say this book was found in the office of Mr. Cartwright; who composed the board of town auditors at that time—was Mr. Cartwright one of them? A. Yes, Mr. Cartwright. Q. Was he a justice of the peace? A. Yes, sir, he was.

FRED. H. MARSH, a witness called on behalf of the plaintiff, being first duly sworn, was examined in chief by Mr. Packard, and testified as follows:

Q. Please state your name, age, residence and occupation? A. My name is Fred H. Marsh; residence, Oregon, Illinois; my occupation is United States Marshal. Q. How long have you been marshal? A. Since June of this year. Q. What were you before that? A. Sheriff. Q. Of what county? A. Of Ogle county. Q. When were you elected? A. Three years ago last fall. Q. Where have you resided since these bonds were issued? A. I have resided in Oregon, Ogle county. Q. Have you been elected to any office beside sheriff, since then? A. Yes, I was elected twice for the legislature. Q. Did you know Mr. James V. Gale in his lifetime? A. Yes, sir. Q. Where did he reside up to the time of his death, from and after these bonds were issued? A.
268 He resided in Oregon, Ogle county. Q. Did you know Mr. Potter in his lifetime? A. Yes; he was a resident of the same town and county up to the time of his death. Q. Where did he reside up to that time? A. The same county and town, Oregon, Illinois. Q. Do you know Mr. Cartwright? A. Yes, sir. Q. Is he alive, or dead? A. He is alive, sir, as far as I know; he was alive when I left home. Q. Where does he reside? A. He resides in Oregon, Ogle county. Q. Has he since then? A. Yes, sir. Q. Does he hold any office there now? A. He is master in chancery. Q. Do you remember whether he has been elected to any other office since then? (Objected to.)

The COURT: I don't see as it makes any difference how many offices these men have had. A. They all stand well there.

The COURT: That is not material; their character is not in issue here at all.

Mr. PACKARD: Where were the town board of auditors previous to April, 1871, in the habit of holding their meetings, in the office of the town clerk or justice of the peace, or where? A. Mostly, sir, in the office of the justice of the peace. Q. Whose office? A. Captain Cartwright's. Q. James H. Cartwright? A. Yes, sir. Q. What time of day were they in the habit of holding their meetings usually? A. Sometimes in the daytime, and sometimes in the evenings.

Gen. EDSALL: I propose to call Mr. Marsh on our own

account. Whether I shall do that now or not is a matter of convenience. I don't care to cross-examine him in anything now; we will wait until we call him.

Mr. PACKARD: I will rest my case here, and you can go on.

Gen. EDSALL: Very well, we will go on. The witness was then examined on behalf of the defendant by Gen. Edsall, in chief, and testified as follows: Q. I understand you were town clerk of the town of Oregon in 1871? A. Yes, sir. Q. I will call your attention to the entry in the book now shown to you, purporting to be the record book of the town records of the town of Oregon, the entry on page 17 of that book of which "Exhibit M" is a copy, purporting to be the appointment of E. S. Potter, supervisor; was there any such appointment made as that indicates on the 31st day of December, 1870? A. No, sir.

[Note. The entry referred to on page 17 is the original entry from which "Exhibit M" is taken.]

Mr. PACKARD: I object to this. It is unnecessary to run over matter half a dozen times. It is already in proof that that was made on the 3d of April, 1871, and was dated as of December, 1870, when these printed dates were printed on the bonds.

The COURT: I don't think there is any dispute about that.

Gen. EDSALL: These are matters of evidence which have been gone into, but I want to use my own discretion in proving the details of this transaction.

The COURT: Well let him answer. A. No, sir. Q. Was there anything said about the appointment of a supervisor on the 31st of December, 1870? A. Yes, there was. Q. State what was said and done at that time. A. Mortimer W. Smith had tendered his resignation as supervisor of the town of Oregon, and on that evening I was sent for to come up to the hotel, and Capt. Cartwright, who was justice of the peace at that time, and Mr. Gale and Mr. Hinckley were there. Q. Please state what Hinckley? A. Mr. Hinckley who was supposed to be president of the Chicago and Iowa railroad. The first question they asked was if I would appoint Mr. Kinney Cleveland supervisor, and I told them no, sir—for the purpose of signing these bonds that had been voted. I told them no, I would not, for the simple reason that Mr. Kinney Cleveland was not morally or financially responsible. They then asked me if I would countersign the bonds with another man by the name of Sharp, who was editor of a paper there, and I told them no, I would not, because he was not responsible financially; and they asked then if I would sign them with Mr. Dwight, and I told them I would if after talking with Dwight to see what he said; and with that the matter rested. There was no other talk about appointing a supervisor. Q. Was there any agreement then to appoint Potter or anybody else? A. No, sir. Q. Who was

present at the time and participated in the talk? A. There was Mr. Gale and Mr. Dutcher, and Mr. Cartwright. Q. Do you know in whose employment Cleveland then was? A. He was in the employ of Mr. Hinckley. Q. Building the road? A. Yes, he was one of the bosses or something; I don't know exactly; he was in his employ. Q. You say Mr. Gale was there, was that James V. Gale, a director of the company? A. Yes, sir. Q. And Cartwright? A. Yes, sir. Q. You say that this entry was not made on the 31st day of December, 1870? A. No, sir. Q. When was it in fact made? A. It was either on the third, the night of the third or the morning of the fourth of April, I think on the evening of the third. Q. If it was not on the fourth, what day
271 was it? A. It was on the third, it was the day before the town meeting, whatever day that was. Q. Who was present at that time, on the night or evening of the 3d of April, 1871? A. When Potter was appointed? Q. Yes. A. Well, Mr. Cartwright, Mr. Gale, Mr. Petrie and myself. Mr. Petrie didn't remain there; he came in the room, but I think he didn't remain there all the time.

The COURT: Four of you were present? A. Yes, sir.

Gen. EDSALL: Was Mr. Potter there at any time or consulted about it? A. Not in the office. Q. Where was Mr. Potter? A. Mr. Potter was home, sick, sir, and not able to leave his room.

The COURT: You held what office, then? A. Town clerk. Q. And Mr. Cartwright, what? A. Justice of the peace.

Gen. EDSALL: Was William Schultz present at the meeting at that time? A. No, sir. Q. He was not? A. No, sir. Q. Was he notified or requested to come there, to your knowledge? A. Not to my knowledge, no, sir. I don't remember where Mr. Schultz was, whether he was in the town or not. I think he had resigned. I know he was not justice at the time; he had resigned. Q. Well, we have stipulated that, and the stipulation is that he tendered his resignation on the 2d day March, 1871, and that no successor was elected until the next April. A. Yes, sir. Q. He was then living, was he not? A. Yes, sir. Q. And resid-
272 ing in the town of Oregon, was he not? A. Yes, sir. Q. In this town record book, on page 9, the election notice has been produced in evidence here, which is "Exhibit J" to the said stipulation; and there has been introduced in evidence the entry on page 9, to which I call your attention (handing book to witness). The entry showing the canvass and result of vote taken is the original from which "Exhibit K" is taken; do you recognize that entry in the original book? A. Yes, sir. Q. Who made it? A. I did. Q. In order to preserve the identity, it is the same paper as the copy is here marked "Exhibit K" to this stipulation. Now, I will ask you whether any judges of election other than the modera-

tor there indicated in the entry, presided at that election? A. No, sir; it was a special town meeting, and the moderator alone presided. Q. As indicated in that entry in the book and in "Exhibit K"? A. Yes, sir. Q. I will call your attention to "Exhibit N" to this stipulation, purporting to be the supervisor's bond (handing witness bond). The paper there purports to bear date December 31, 1870, in the middle of it. A. Yes, sir. Q. When was that bond, in fact, if you know, made and filed or presented there? A. Well, it could not have been made there until April third, for the simple reason that there was no appointment made until that time and consequently the bond could not have been made until that time. Q. Did you know of any such bond being made before that time? A. No, sir. Q. I will call your attention to "Exhibit O" attached to the stipulation, and state when that oath was in fact made? A.
273 At the same time, April third. Q. When was it in fact made?
A. It was made April third, the year following its date. Q. It was not made December 31, 1870? A. No, April 3, 1871, but this bears date December 31, 1870. Q. I will call your attention to the entry showing the meeting of the town auditors, appearing on pages 19 and 20 of this leather-covered book (handing witness book). You were then town clerk? A. Yes, sir. Q. And you were yourself present at that town board meeting? A. Yes, sir. Q. Who beside yourself were present at that town board meeting? A. Capt. Cartwright. Q. Was anybody else present? A. No, there was no other member of the town board at that time; Mr. Smith had resigned, and Schultz had resigned.

The COURT: Mr. Schultz had resigned and refused to act? A. Yes, he resigned some time before.

Gen. EDSALL: You say Mr. Schultz had resigned, and there had been no successor appointed or elected? A. Yes, sir. Q. Then under the law and the constitution he could not get out of office in that way? A. That is a question of law. (Objected to.)

The COURT: Yes.

The WITNESS: I am not a lawyer.

It is admitted by the parties that the town of Oregon was only allowed by law two justices of the peace.

Gen. EDSALL: I wish to go back to the matter I was examining the witness about. I was examining you, Mr. Marsh, as to who was present at this meeting of the town auditors purporting to be held on the 28th day of March, 1871, and you said yourself and Mr.
Cartwright. A. Yes, we were the only officers at that time
274 acting. Q. Was Mr. Potter present? A. No, sir. Q. Had he ever up to that time claimed or pretended to be supervisor of this town, or previous to that meeting of March 28, 1871? A. No, sir; he was not then appointed. Q. Had he performed any act as supervisor, or pretended to be supervisor before the evening

or night of April 3, 1871? A. No, sir. Q. Please examine the signature on page twenty of this book "E. S. Potter," and state in whose handwriting, if you know, that signature is? A. That is in E. S. Potter's handwriting, his own, I am acquainted with his handwriting. Q. Was that put there at the time of this meeting? A. No, sir; I don't know when it was put there. Q. Was it put there at any time prior to the night of April 3, 1871? A. No, sir. Q. How it got there you don't know? A. No, sir; I do not Q. Only you know it is the genuine signature of Dr. Potter? A. Yes, I know that is Dr. Potter's signature. Q. And you know that he didn't pretend to act as supervisor up to the time of holding this meeting on the 28th of March? A. No, sir; I know that he hadn't. Q. Had he received any kind of appointment? A. No, sir. [The minutes of the meeting of the board of town auditors held March 28, 1871, referred to by the witness appears in the book of town records, at pages 19 and 20, and the record of said meeting in said book has signed thereto the name "E. S. Potter, supervisor," together with J. H. Cartwright, justice of the peace and F. H. Marsh, town clerk, indicating that all three of them were present at said meeting and acted thereat as members of said town board. This being the only meeting shown by said record book to have been held between December 31, 1870, and April 4, 1871.] Q. Now,
275 I wish to come down to what took place on the night of April 3, 1871. You have stated, if I remember rightly, that yourself and J. H. Cartwright were there at the time this appointment was made, appearing on page 17 of this book, "Exhibit M." Please go on in your own way and state how that appointment came to be made on that night of April 3, 1871, and what was then done, give us a history of what occurred at that time? A. On the evening of April 3, Capt. Cartwright came over to see me and said, that it was necessary to have a supervisor appointed that evening, and he asked some questions about countersigning the bonds after one was appointed, and I told him that I thought for my part that I would not sign with anybody that was irresponsible, and he asked me if I would sign with Dr. Potter, and I told him I would see Dr. Potter; he was at his house sick; and we went down there together in the evening, and the doctor was lying on the sofa, and I went to him and spoke to him, and I said, "Doctor, there is a question involved here about signing these bonds before holding the election, and I don't see why these bonds should be signed to-night, why it is necessary." And he said, "Because the parties are liable to enjoin the issue of them before a supervisor is elected to-morrow," and he said it would cause litigation; and I said, "That does not make any difference; the idea is, who is responsible for this?" and he said, "As far as you are concerned, you are not responsible; merely countersigning the bonds, I will take the responsibility." And he said, "I will

pledge you my word of honor that these bonds shall not go out of my possession until it is decided whether they are legal or not." That is nearly word for word.

The COURT: Who said that? A. Dr. Potter; until it is decided whether they are legal or not. He said: "I will merely hold them as a third person in trust." And with that understanding the bonds were signed, and were countersigned by me.

Gen. EDSALL: That occurred between you and Potter? A. And Dr. Potter. And he also said in connection with that, that there was an attorney that he was acquainted with, Mr. Irwin; that he was going to consult him. Ididn't know Mr. Irwin, but I remember that.

276 Q. What time in the evening was that meeting there with reference to the appointment being made, which was in Cartwright's office, as I understand? A. I don't remember; but to the best of my knowledge it must have been between seven and nine o'clock in the evening. Q. This talk with Potter—that was at his house? A. That was at his house. Q. Was that before, or after? A. It was before; it was before the appointment was made, and before there was any decision whether he would be appointed. Q. And after his saying that—whatever was done in the way of appointment, was done between you and Cartwright? A. Yes; and afterwards we went to Cartwright's office, and the bonds were signed; then we went down to his house. Q. It was right off, one continuous act? A. Yes, that evening. Q. And the appointment and the signing of the bonds was part of the same continuous transaction? A. Yes, that same evening. Q. And the appointment was made in order that he might sign with you? A. That was why the appointment was made, sir; that was the understanding. Q. I will ask you this question: The signing of the bonds, as I understand you, proceeded immediately after the making of the appointment? A. Yes, sir. Q. And the filing of this oath of office? A. Yes; after the oath of office was filed, the bonds were signed.

Gen. EDSALL: That is all.

Mr. PACKARD: That is all.

The WITNESS: I would like to state in connection with that, if there is no objection, that I was as much surprised as any one that these bonds had been given out from Mr. Potter's hands; I didn't know it for months afterwards.

277 Gen. EDSALL: I will ask you a question, Mr. Marsh; were you in town there the next day at the town meeting? A. Yes; I was clerk of the election. Q. Do you know whether the people there, that is the public generally, knew that the bonds had been signed and that Potter had been appointed supervisor at that time? A. No, sir; it was not known. Q. Did Potter make any report to the town meeting held April 4, 1871, as to what he had done? A. No, sir. Q. Did you, in fact, then

know that the bonds had been delivered to the railroad company? A. No, I did not. Q. When did you know it first? A. I don't know when; it was some time after. It came to me by rumor, and I went to Mr. Potter and asked him, and he said— Q. Can you give any approximate estimate as to the time when you first knew the bonds had been put out of Potter's hands? A. No, sir, I could not; it was some time after—it was some time during that summer. Q. Did you have anything to do with registering the bonds in the supervisor's book? A. No, I didn't know anything about it. Q. It was some weeks or some months afterward before you knew the bonds had been put out of his hands? A. Well, I think it was some weeks after. Q. And, of course, you knew when they were signed? A. Yes, sir.

The COURT: They were signed and put into Potter's hands? A. Yes, sir; they were left there with him. Q. On that night? A. On that night.

278 WILLIAM J. MIX, a witness called on behalf of defendant, being first duly sworn, was examined in chief by Mr. Edsall, and testified as follows:

Q. What is your name? A. William J. Mix. Q. Where do you reside? A. Oregon. Q. Did you reside there in the year 1871? A. Yes, sir. Q. You had resided there for some years before, hadn't you? A. Yes, sir; for fifty years last October, sir, it has been my home except three years in Chicago. Q. Do you remember the town meeting held April 4, 1871, in the town of Oregon, when Mr. Dwight was elected supervisor? A. Yes, I do, very distinctly. Q. Were you present there at the town meeting? A. I was. Q. You, of course, were a voter in that town? A. Yes, sir. Q. Do you know whether it was known to the public on that day that these bonds had been signed by Potter as supervisor of the town? A. The day of the election I know it was not, sir, as well as a man can know anything of that kind. Q. Was it known there to the people that Potter had pretended to act as supervisor? A. It was not, sir. Q. Do you remember what the question was upon which the issue was made upon which the supervisor was elected that day? A. I do; yes, sir. Q. Please state it briefly. A. The question of the election of the supervisor that day hinged upon the issuing of the bonds to the Chicago and Iowa Railway Company. Q. And the Ogle and Carroll County

279 Railroad Company? A. Yes, sir; they were considered as one road. There was a feeling on the part of the citizens that the bonds of the town ought not to be issued to the railroad company, and that they should not be until the authorities of the town were satisfied that they were legally held for the bonds,

or that they could be legally issued. There was no disposition to go back of the issuing of the bonds if they could be legally issued, or they were legally held for them. Mr. Waggoner was talked about as a candidate for the office of supervisor representing that general feeling of the town. It was also, by rumor, on the morning of the election, stated that Mr. Dwight was to be a candidate, representing those who were for issuing the bonds anyway, whether right or wrong; and Mr. Dwight was an old citizen and an old time acquaintance of mine, and this conversation occurred in my place; and when this rumor came in, and that Mr. Dwight was going to run, I said to some of my friends who were in there that I didn't think that Mr. Dwight would do that—would run on that question—and I went and saw Dwight. (Objected to).

Gen. EDSALL: I am coming to a conversation between the citizens and Mr. Dwight.

The COURT: I hardly think that would be competent.

Gen. EDSALL: Well, did you go and see Dwight? A. I did. Q. Was Waggoner voted for after that? A. He was not; they stopped voting for Waggoner after ten o'clock. Q. After what? A. After Mr. Dwight said he would do what the citizens wanted. Q. I will ask you what that was that Dwight said he would do about it?

Mr. PACKARD: Is that competent, your Honor?

The COURT: I don't think that is competent.

Gen. EDSALL: Then when you saw Dwight, you were satisfied and everybody stopped voting for Waggoner? A. Yes, sir. Q. When did you first learn the fact that the bonds had been signed by Potter and put out? A. I could not tell you; it was some time after the election; there was a rumor and in fact, when we commenced the injunction suit, I did not know that the bonds were issued only by rumor, and we took that step. I refer to the injunction suit of W. J. Mix and others against E. S. Potter and others. Q. Had there been any record disclosed to the public showing the issue of the bonds? A. I know of none, I knew of nothing only by rumor. Q. Do you remember the time when this first division of the Ogle and Carroll County railroad was so far completed that cars could be run between Rochelle and the east bank of Rock river opposite Oregon? A. Well, it was the fore part of April, 1871, I should think, I could not state exactly the time. Q. Was it completed on the first day of January, 1871? A. No, sir; nor for three months later. Q. What was done, if anything, with the west end of the track as laid down opposite the town of Oregon, on the east bank of the Rock river for two or three miles?

Mr. PACKARD: When, before, or after this transaction?

Gen. EDSALL: Well, we will find out.

Mr. PACKARD: I object to it unless he confines it to something before these bonds were issued.

Gen. EDSALL: What I propose to prove is this, that this company that put down this track claimed that two or three miles of the track next east of Oregon was only laid temporarily and that it was taken up by this consolidated company, and the line for two or three miles from the river, east of Oregon, deflected to the south so as to cross Rock river one mile south of the town of Oregon. This was done after the bonds were issued.

The COURT: How can that be material?

Gen. EDSALL: Well, we will offer it. The court excluded the evidence so offered to which the defendant then excepted. That is all, Mr. Mix.

281 Mr. PACKARD: That is all.

GEORGE M. DWIGHT, being recalled on behalf of the defendant, was examined by Gen. Edsall, and testified as follows:

Q. You stated you received this supervisor's book referred to immediately before the September meeting of the board of town auditors, that you had difficulty in finding it, but that you found it? A. Yes, sir. Q. Look at the entries commencing on page 264, and running to page 301, and state whether those are the entries of registration, to which you referred, when you stated that they were in the book when you received it? A. Yes, sir; they are. Q. Do you recognize the handwriting there? A. I cannot identify the handwriting. Q. And you say you never authorized any one to put that in that book? A. No, sir. Q. It was there when you got the book?

Mr. PACKARD: He swore to that once.

EDWARD F. DUTCHER, a witness called on behalf of the defendant, being first duly sworn, was examined in chief by Gen. Edsall, and testified as follows:

Q. What is your name? A. Edward F. Dutcher. Q. What is your profession? A. Well, sir, I am a lawyer by profession. Q. Where were you practicing law in the year 1871? A. Oregon, Ogle county, Illinois. Q. With whom did you then office, if any one? A. James H. Cartwright. Q. Mr. Cartwright, who was one of the justices of the town, as I understand? A. Yes, sir; he was. Q. Please examine this book, called the Supervisor's Book of the Town of Oregon, and the entries therein, commencing on page 250, and ending on page 301,
282 and state if you know in whose handwriting those entries were made? (Handing witness book.) A. Commencing on page 250? Q. Yes. A. It is the handwriting of George P.

Jacobs. Q. On page 250? A. Yes, sir. Q. Then I commenced too far back?

Mr. PACKARD: Who was Jacobs? A. He was the old supervisor of the town of Oregon.

Gen. EDSALL: I commenced too far back; my question was wrong, and I will call your attention, now commencing on page 264, and from thence to page 301. State in whose handwriting those entries are? A. The handwriting and the figures are all in the handwriting of James H. Cartwright. [The entries on page 264 to 301 were the same entries, showing registration of bonds, and the caption thereto, introduced in evidence from said book by plaintiff.] Q. I understood you that during the summer of 1871 you and Mr. Cartwright were occupying the same office? A. Yes, we occupied that for several years. Q. Did you know of this book being in Cartwright's possession during that summer? A. I saw the book in the office, sir.

Mr. PACKARD: What is that? A. I saw the book in our office, Cartwright & Dutcher; we were not in partnership, but we occupied the office together; we had two rooms there.

Gen. EDSALL: Have you any recollection of the fact of Cartwright making this registration during that summer or season? A. I think at some time I noticed that book, and the record being made by him. Q. Do you remember of the town meeting being held in the town of Oregon at the time Dwight was first elected super-
283 visor in 1871? A. I recollect it well. Q. Do you remember, with reference to that town meeting, when Dwight commenced to act as supervisor? A. I think I do. Q. With reference to Dwight's election and qualification as supervisor, according to your recollection, when was the registration of the bonds spoken of here, made by Cartwright? A. My recollection is, it was made after that time; I would not swear positively, but that is to my best recollection. Q. Have you any particular reason for thinking that he did not make it until after Dwight's election and qualification; what Cartwright was doing, or anything of that kind? A. Well, I have no recollection of knowing anything about any bonds being issued until Mr. Dwight had been elected and had qualified for several days. Q. You knew when this registration was done? A. I think I do, sir. Q. And you knew that you did not know anything about the bonds being issued until after Mr. Dwight was elected and qualified as supervisor? A. I didn't know anything about it for a week or two—that is my best recollection about it now. Q. Well, if you had known of this registration then, you would have known the bonds had been issued? A. I should come pretty near knowing it. Q. Have you any recollection as to how this book got into Dwight's possession, and under what circumstances —have you any recollection about it? A. No, sir; but just before

the meeting of the board of town auditors. Q. What year? A. The year 1871; the board of supervisors meets on the second Tuesday of September, and the board of town auditors meets the Tuesday preceding that time; either the day that the auditors were to meet or a short time previous Mr. Dwight came to our office and inquired where that book was—about that time; I am not positive as to the date.

The COURT: About what time do you say? A. It was
284 either the day that the town auditors were to meet or about that time; I could not say positively.

Gen. EDSALL: You mean the fall of 1871? A. Yes; it was just before the meeting of the supervisors, which was the second Tuesday of September. Q. And the town auditors' meeting was the Tuesday before? A. The town auditors met the Tuesday before the meeting of the supervisors in September, and also on the Tuesday previous to the annual town meeting in April each year, for the purpose of auditing the town accounts. Q. Well, did you know anything further about that than that he came and inquired after that book? A. I didn't know. I know he inquired of me, and I told him I didn't know anything about that book. Q. You stated you remembered very well the election at which Dwight was elected supervisor? A. I do. Q. Did you know on that day that the bonds had been signed by Potter? A. I did not. Q. Did you then know that Potter had been appointed supervisor of the town? A. I did not. Q. You were there in the town at that time, and were present at that election? A. I was there all the time in the office. I was there with Mr. Cartwright in the office, and the railroad company's office was kept there at that time, during the building of the road. The engineers made their profile and maps there. Q. Were you acquainted with the men who acted as the president and directors of the Ogle and Carroll County Railroad Company? A. Yes, sir. Q. Please state who, to your knowledge, they were up to April 3, 1871? A. Frederick G. Petrie was president of the Ogle and Carroll County railroad; James
V. Gale was vice-president of the Ogle and Carroll County Rail-
285 road Company and Henry A. Mix and Michael Nohe were directors; Martin H. Ettinger was secretary and treasurer. Henry A. Mix, one of the directors, got killed in falling off of the bridge during the fall of 1869, and Mr. Elias S. Potter was elected a director in his place. Q. That is, of the Ogle and Carroll County railroad? A. Yes, sir, of the Ogle and Carroll County Railroad Company. Q. Now answer the same question as to the Chicago and Iowa railroad? A. Francis E. Hinckley was president and general manager; E. B. Shumway was secretary. I think Mr. Frederick G. Petrie was vice-president and James V. Gale and Elias S. Potter were two of the directors. Q. Who was the attorney, if

any one, of the Chicago and Iowa railroad during 1871? A. James H. Cartwright. Q. The same Cartwright who occupied the office with you? A. Yes, sir. Q. And the same who made these entries in the supervisor's book? A. The same one who made these entries, and did all the business of the company except what I did. Q. You were present at the election on the 4th of April, 1871? A. I was, sir, early. Q. Round among the people? A. Yes, sir. Q. You voted there? A. I did, sir. Q. How much were you about there during the day to see and talk with them? A. I was there about an hour before the polls opened and until they closed—until the votes were counted. Q. Did you meet any men that day that knew the bonds were issued or claimed to know it? A. No, sir, I did not. Q. What was the question on which the election was being contested, if any, that day? A.

There was a contest early in the morning. Joseph Waggoner
286 was being run by certain parties when the polls first opened in the morning, against Mr. Dwight. I was working for Mr. Dwight because I had talked with Dwight the night before, and I met Mr. HughRay just south of the clerk's office, south of the post-offiice, and the polls were being held in the court house, and he says to me, "Ed, why are you voting for Dwight?" (Objected to.)

The COURT: I don't see how that is competent.

Mr. EDSALL: In the counsel's opening for plaintiff he undertook to state what the issue at the town meeting was, and we desire to get the real facts before the jury on that question.

The COURT: Well, the witnesses all said that it was not known, and there was no claim made that it was known. I don't see that it is material, as far as the validity of the bonds is concerned, whether it is known or not.

Mr. EDSALL: Mr. Dutcher, have you been in court here while this case of Wallace *against* The Town of Oregon has been referred to, that was tried in November, I think, of 1874? A. Alexander Wallace *against* The Town of Oregon? Q. Yes; you have heard a reference to that case, and the evidence put in about it? A. Yes, sir. Q. Do you know who tried that case for the plaintiff? A. I tried it myself for the plaintiff. Q. Mr. Sackett was with you? A. Mr. Sackett assisted me, but he had nothing to do with the trial, particularly. Q. Have you a distinct recollection as to the questions that were actually litigated on that trial? A. I think I have, sir. Q. Have you examined the pleas that are now on file in this case of Eliza Jennings *against* The Town of Oregon—the second, third and fourth pleas? A. I have

read them. Q. What were the issues—the pleadings, as you
287 recollect, on the former trial, in the Wallace suit? (Objected to.)

The COURT: He may state generally.

Mr. PACKARD: It is a matter of writing.

The COURT: Of course, as far as the pleadings show they show what the issues were conclusively. He may answer it.

A. There was a special count on the coupons and a general count in assumpsit, and a sworn plea of general issue, or rateer the general issue sworn to; that was all the pleadings there was about the case. Q. Was there any defense set up on the trial, such as was indicated, for instance, in the first special plea—or second amended plea in this case now on trial? A. There was not. Q. Was there any defense set up on that trial, as indicated in the third plea in this case? (Objected to.)

Mr. PACKARD: I object to this, and ask to have this testimony excluded.

The COURT: He was one of the attorneys who tried the case; I think he may state his recollection about it.

Mr. PACKARD: I object to it; it has been stipulated to, and I object to it as being put in from his legal opinion; that is a matter of law, he can show what the evidence is, and that is the only way to get at it. I move to strike out that last question and answer.

The COURT: Well, note the exception.

Mr. PACKARD: I also wish to except to every one of these questions of that character.

A. That second plea is under the 73d chapter, 11th section of the title of negotiable instruments of the Revised Statutes then in force, that was re-enacted in 1874, wasn't it? Q. Yes, that is the second plea. Was there any defense made under that section of the statute? A. There was evidence offered here, I think, as to the signing of the bonds and all those things under objection, and then when we introduced Mrs. Jennings' deposition showing that she was a *bona fide* purchaser for value, the court said, under the plea of general issue, that that could not come in, as it was no defense under 288 that plea of general issue. Q. You remember that Mrs. Jennings' deposition was read on that trial? A. I read it myself. Q. That same one that was read here last night? A. I didn't hear it read. Q. Now, as to that third plea, which is based on section 12 of article nine of the constitution, was there any defense attempted to be put in under that section, on that trial, or evidence introduced showing the assessed value of the taxable property in the town of Oregon? A. No; no evidence was introduced during the whole trial on that question. Q. That is, showing what the assessed taxable property of the town was for 1870, and what the indebtedness was? A. No, sir; there was nothing of that kind shown on that trial. Q. Not anything of that kind introduced at all? A. No, sir.

The COURT: Was there any claim made that the bonds were not legal under that section of the constitution? A. No, sir; there was

nothing of the kind. Q. The court didn't pass on that question at all? A. No, sir.

Gen. EDSALL: Was there any question raised on the trial as to the question whether this vote to be taken under the charter of the Ogle and Carroll County Railroad Company, for the town to issue the bonds, could be taken at a town meeting presided over by a moderator, instead of being taken at an election presided over by election judges? A. No, sir; there was nothing of that kind in the trial. Q. No such question was raised? A. There was no such question raised in the case. Q. You were then one of the attorneys trying that case? A. Yes, sir. Q. Are you the attorney for either party in this case now on trial of Mrs. Jennings against the town of Oregon? A. No, sir; I have distinctly and per-
289 emptorily refused to come here and try this case; to Mr. Gale and also to Mr. Mix.

Gen. EDSALL: There is a question I intended to ask you. Do you remember as to anything occurring as to the appointment of the supervisor, or talking about it, on the 31st day of December, 1870? A. I do, sir. Q. State what you know that occurred then? A. I was requested to come around to Lee's Hotel about nine o'clock on the 31st of December, 1870, and I found Mr. Francis Hinckley, Captain James H. Cartwright there, and Elias S. Potter, James V. Gale, and a few minutes afterwards Frederick H. Marsh came in. Q. State what took place there? A. Mr. Francis Hinckley wanted Mr. Kinney Cleveland, one of his bosses on the railroad, appointed supervisor, for the purpose of having issued forty thousand dollars in bonds, and Mr. Frederick H. Marsh said to him, "I will not sign any bonds with Kinney Cleveland; he has neither any moral or pecuniary responsibility." Q. What next? A. Dr. Potter said he didn't know what difference it would make; whether Kinney Cleveland was responsible or whether he was not responsible, and Marsh said, "I won't sign with him under any circumstances," and then they proposed either Mr. Hinckley or Elias S. Potter. I don't remember which proposed John Sharp, a relative of Mr. Petrie's, who had been the editor of a paper, that he should be appointed supervisor, and Mr. Marsh said he would not sign, with him, any bonds; and Marsh said further he would not sign the bonds any way with anybody, unless they were to be held until it could be ascertained whether they could be legally issued, or not, by some third party, and I said to Mr. Marsh myself, "Cap—
(Objected to.)

Mr. PACKARD: Is that competent, your Honor? How does that affect the validity of these bonds?

The COURT: I don't think the conversation is competent. That is the same question that the court has ruled on two or three times.

Gen. EDSALL: Very well. These persons who were present
290 then told Francis E. Hinckley, the president of the Chicago and Iowa Railway Company, James V. Gale, who was vice-president and director of that company, Mr. Potter, a director in both companies, and Mr. Petrie, who was president of one company? A. Yes; but I don't think Mr. Petrie was there. He was not there, according to my recollection.

*Cross-Examination by Mr. Packard.*

Q. You remember in the former trial, Major, of the court charging the jury that—did you hear this charge read yesterday? A. Only a small part of it, Mr. Packard. Q. Well, this is what you referred to as the ruling of the court that the bonds being issued, and in the hands of an innocent purchaser? A. No, sir; it was a remark made by the court during the trial. Q. Well, were there any other remarks made than those that were read from the shorthand reporter's notes? A. I didn't hear it read; I didn't want to hear it read. I take it from my own recollection. Q. You think your recollection is better than the shorthand reporter's notes? A. No, sir; but I am swearing from my own recollection, and not from the reporter's minutes. Q. Don't you recollect of interrupting the court and saying that Mr. Potter was not a director in the railroad company at the time of his appointment, that he had resigned? A. Yes, sir; I do; and I think it was exceedingly impudent, too. Q. Well, was that true? A. Yes, sir. Q. That he was not a director at that time? A. No, sir; he had resigned that same night.

The COURT: Do you wish Mr. Dutcher to testify to any conversation in regard to issuing the bonds before they were issued?

Gen. EDSALL: He testified in regard to a conversation among
291 the officers December 31, 1870, before the bonds were issued, and he was going on to state what he told Mr. Marsh right there in the presence of all of them, as a part of the same conversation.

The COURT: I had an impression that the conversation that we had was not before the bonds were issued; you can call him back if you wish to.

Gen. EDSALL: I wish to ask you another question. The court, under a misapprehension of the time, sustained an objection to your stating the rest of that conversation that occurred on the 31st of December, 1870, at which Mr. Hinckley, Mr. Potter and Mr. Gale were present, and yourself. A. You mean at Lee's Hotel. Q. Yes. A. Yes, sir. Q. You were about to tell what you said to Mr. Marsh, now you will take up the conversation again and go through with it. A. Well, Capt. Marsh said, "I won't sign with John Sharp; I won't sign with anybody unless the bonds are put

into the hands of some third party, and it is ascertained whether they are legal or not." And I said to him, "Cap., I wouldn't sign the bonds at all; the thing is crooked, and you had better let it alone, you may get into trouble." Q. That was said there at that time? A. When we were together. Q. And you said as to what occurred on the night of the 3rd of April, 1871, you do not know, you were not present? A. I don't know anything about it; I was not present, sir, when the bonds were signed. I was not at our office that night. They were signed at Dr. Potter's house, as I understand.

Gen. EDSALL: That is our case; I understand these stipulations are all in.

Mr. PACKARD: I think they are all in.

Gen. EDSALL: Well, we will have it so understood. There can be no mistake as to what they are, they are marked "Filed."

292 The foregoing was all the evidence offered by either party on said trial.

Counsel for defendant thereupon presented to and requested the court to give to the jury each of the instructions numbered from 1 to 23 inclusive, of which the following is a copy:

293 Eliza Jennings
*vs.*
Town of Oregon.

As to the questions arising under the second plea, the court is requested to charge the jury:

1. A defendant is not estopped by a judgment and verdict in a former suit, from making a defense in a subsequent suit upon a different cause of action, which was not pleaded, and could not under the rules of law have been made under the pleadings in such former suit.

2. And although it may appear from the evidence that the same circumstances tending to show fraud and circumvention were in fact proven in such former suit, as are now offered in evidence in this suit, the verdict in such former suit may have been found for the plaintiff therein upon the ground that the statutory defense that the making and execution of the coupons sued upon in that suit was obtained by fraud and circumvention, was not pleaded
294 therein in such manner as to enable the defendant to avail itself of that defense against a *bona fide* holder of the coupons for value. Under such a state of the pleadings, the verdict and judgment in such former suit would not estop the defendant from pleading and setting up in a suit brought upon other coupons, and a different cause of action, the defense that the making and execution of

the coupons now offered in evidence was obtained by fraud and circumvention.

3. If the jury find from the evidence that the making and execution of the bonds and coupons offered in evidence was obtained by fraud and circumvention in the manner and as alleged in the second plea, the jury should find the issues for the defendant on that plea.

II.

*As to the questions arising upon the third plea:*

The court is requested to charge the jury:

4. That section 12 of article 9 of the constitution of the State of Illinois, adopted in 1870, contains the following provisions:

"No county, city, township, school district, or other municipal "corporation, shall be allowed to become indebted in any
295 "manner, or for any purpose, to an amount, including ex- "isting indebtedness, in the aggregate exceeding five per "centum on the value of the taxable property therein, to be ascer- "tained by the last assessment for state and county taxes, previous "to the incurring of such indebtedness. * * * This section "shall not be construed to prevent any county, city, township, school "district, or other municipal corporation, from issuing their bonds "in compliance with any vote of the people which may have been "had prior to the adoption of this constitution in pursuance of any "law providing therefor."

The constitution containing this section took effect, and has been in force since August 8, 1870.

5. It appears from the admission and stipulation of the parties read in evidence that at the time of the issuing of the bonds and coupons sued upon in this case, the town of Oregon then had existing and owed an indebtedness exceeding five per centum of the value of the taxable property in the town, as ascertained by the last assessment for state and county taxes previous to the issuing of said bonds and coupons—that is, as appears by the assessment for the year 1870.

296 Under this state of facts the town of Oregon then had no power or authority to issue the said bonds and coupons, except so far as such power was reserved by the last paragraph of said section 12, article 9 of the constitution.

By virtue of that provision the power was only reserved to issue said bonds "*in compliance*" with a vote of the people of the town, had prior to the adoption of said constitution, in pursuance of some law providing therefor.

No power was thereby reserved to issue such bonds otherwise than in compliance with such vote, nor to issue the same in violation of the condition imposed by such vote.

6. The plaintiff in this suit is chargeable with notice of the provisions of the state constitution and of the assessed value of the taxable property in the town, and was bound to know that the supervisor and town clerk of the town, at the date of the bonds in question, had no power to issue the same and thereby to create a debt in excess of five per cent. of such assessed value of the taxable property in the town, unless the same were issued *in compliance* with such vote of the people, had prior to the adoption of the said constitution.

7. The bonds in question contain no recital or statement showing that the same were issued in compliance with any vote of
297 the people of said town, had prior to the adoption of said constitution, and there is nothing upon the face of the bonds or coupons which estops the town from showing that the bonds were not issued in compliance with such vote, but that the terms and conditions upon which the donation and bonds were in fact voted were not complied with.

8. The general laws of the State of Illinois in force since April 16, 1869, contain this provision:

"And any county, township, city or town shall have the right, "upon making any subscription or donation to any railroad com- "pany, to prescribe the conditions upon which such bonds, sub- "scriptions or donations shall be made, and such bonds, subscrip- "tions or donations shall not be valid and binding until such condi- "tions precedent shall have been complied with."

Rev. Stat. Ill., Chap. 113, § 17.

9. It appears from the copy of the notice of the election held June 13, 1870, read in evidence, that such notice contained the following provision:

"Said bonds not to be issued, dated or delivered until said
298 "company shall have completed said first division of said rail- "road with a T rail weighing not less than forty-five pounds "to the yard, in condition to run trains thereon, from a connection "or intersection with the Chicago and North-Western railway to a "point at and within said town of Oregon within one half mile of "the east bank of Rock river, and shall have equipped the same "with rolling stock sufficient to operate a daily train to and from "said town for the accommodation of passengers and freight, nor "until said company shall have released said town from all liability "on account of donation heretofore voted, except a donation of ten "thousand dollars, voted by said town on the 9th day of December, "A. D. 1869; said vote of forty thousand dollars to be null and "void unless said first division of said railroad shall be completed "and equipped as aforesaid on or before the 1st day of January, A. "D. 1871; but in case the same shall be so completed and equipped "within the time aforesaid, and said company shall execute and

"deliver said release, then the said bonds to be deliverable upon the "demand of said company and to bear date of the day of de- "livery."

299 10. It also appears from the copy of the record made of the canvass of the votes cast at said election, read in evidence, that said election resulted as follows: "For donation *as stated in the notice*, one hundred and sixty-three votes. Against donation *as stated in the notice*, twelve votes."

11. The town had the right under the law to thus prescribe the condition precedent upon which the donation might be made and the bonds issued.

12. If the jury find from the evidence that the first division of the Ogle and Carroll County railroad was not completed, as prescribed in said notice of election, from a connection or intersection with the Chicago and North-Western railway to a point at and within said town of Oregon, within one-half mile of the east bank of Rock river, on or before the first day of January, A. D. 1871, as required by the terms of said notice of election, and the vote before mentioned; then the jury are instructed, that in view of the admitted facts in this case in respect to the assessed value of the taxable property in the town, and the amount of its then existing indebtedness, such vote, after the failure to comply with the conditions thereof, constituted no

300 authority to the supervisor and town clerk of said town to issue said bonds; and any attempt on their part to issue the same at any time after August 8, 1870, without compliance with the conditions of the vote authorizing the same, is void and of no effect.

13. The jury are further instructed, that by virtue of the provisions of said § 12, Art. IX of the constitution, when applied to the admitted facts of the case in respect to the indebtedness of the town, and the assessed value of the taxable property in said town of Oregon, the supervisor and town clerk of said town had no power or authority at any time after August 8, 1870, to waive compliance with the conditions of said vote, and issue the bonds, when such vote had not been complied with.

14. And the jury are further instructed, that if they find from the evidence that the bonds and coupons offered in evidence were issued after August 8, 1870, without compliance with the vote of the people of the town, prescribing the conditions upon which the same might be issued, the same are void, and the plaintiff cannot recover thereon in this action.

15. A former recovery upon one cause of action will not estop the defendant from setting up and proving, in a subsequent suit upon a different cause of action, a defense which might have been,

301 but in fact was not relied upon or proven, and actually litigated in such former suit.

16. Unless the jury find from the evidence that the defense set

up in the amended third plea, based upon the provisions of § 12, Art. IX of. the state constitution prescribing limitations upon municipal indebtedness, was attempted to be proven and actually litigated in the former suit brought in the name of Wallace, referred to in the evidence, the verdict and judgment in such former suit would not estop the defendant from making that defense in this suit.

17. The burden of proof rests upon the plaintiff to show that the same defense or defenses were actually relied upon, and litigated in, the said former suit, before the verdict and judgment in such former suit can be held to estop the defendant from making such defenses in this suit.

18. Neither the recitals contained in the bonds offered in evidence, nor the statements contained in the certificate purporting to be signed and sworn to by E. S. Porter as supervisor, a certified copy of which was offered in evidence; nor the certificate of
302 the auditor of public accounts endorsed upon said bonds, were sufficient in law to estop the defendant from making the defense set up in the amended third plea, and showing that said bonds and coupons were issued in violation of section 12 article IX of the Constitution of the State of Illinois.

*Dixon County* v. *Field*, 111 U. S., 83, *91*, *92*, etc.
*Carroll County* v. *Smith*, 111 U. S., 556.
*Buchanan* v. *Litchfield*, 102 U. S., 278.
*National Bank* v. *Porter Tp.*, 110 U. S., 608.

The court is also requested to give to the jury each of the foregoing instructions numbered from one to eighteen, severally.

III.

As to the questions arising upon the fourth plea, the defendant requests the court to give the jury each of the following instructions:

19. The jury are instructed that the election authorized to be held in the town of Oregon by section six of the act read in evidence, entitled "An act to amend an act entitled an act to incorporate the Ogle and Carroll County Railroad Company" was required by the laws of Illinois to be presided over by the three judges
303 of election of said town; and that such election could not be lawfully held and presided over by a moderator in the manner prescribed by law for holding town meetings.

20. The jury are therefore instructed that if it appears from the evidence that the vote taken upon the question of making a donation by the town of Oregon of $40,000 in bonds to said railroad company was not presided over by judges of election as required by law in relation to elections, but was held and presided over by a moderator as required by law in relation to town meet-

ings, the same was not an election held in pursuance of law and would not constitute any authority for making the proposed donation and issuing the bonds of the town, after the adoption of the new constitution of Illinois on the second day of July, 1870.

21. The recitals contained in the bonds produced in evidence are not sufficient to estop the town of Oregon from making the defense in this action set up in the fourth plea, notwithstanding the plaintiff may appear to be a *bona fide* holder of the said bonds and coupons thereto attached, for value.

The defendant also requests the court to give each of the following instructions to the jury.

304 22. If the jury believe from the evidence, that the entry of registration and recital read in evidence from pages 264 to 301 of the supervisor's book, read in evidence, were written in said book by J. H. Cartwright after George M. Dwight became supervisor of the town of Oregon, and while said Dwight was such supervisor, and that the same were written by said Cartwright in said book without the knowledge, consent or authority of the supervisor of said town then in office, such entry and registration of said bonds, so made in said book without authority of the supervisor, would not estop the town from making the defenses set up in this case.

23. And even in case the supervisor had authorized said Cartwright to write such recital and make such registration in said book, the same would not estop the town from showing the recital as to the bonds mentioned therein, being made in pursuance of the election therein referred to, was in fact untrue. The town supervisor in the registration of the bonds, had no authority to make any recital upon that subject which would be obligatory upon the town as an estoppel.

305 The court refused to give any or either of said instructions to the jury so asked by the defendant, to which refusal the counsel for defendant then and there excepted; and the court thereupon instructed the jury to find a verdict for the plaintiff for the amount of the coupons sued upon and produced in evidence, with interest thereon at six per cent. per annum from the date of each coupon, which was all the interest claimed by the plaintiff. To which charge and instruction by the court, that the jury should find a verdict for the plaintiff as aforesaid, the defendant, by its counsel, then and there excepted.

Thereupon the jury returned a verdict finding the issue for the plaintiff, and assessing plaintiff's damages at twenty thousand eight hundred and twenty-three and $\frac{68}{100}$ dollars ($20,823.68). Whereupon the defendant entered a motion for a new trial on the following grounds:

1st. That the court erred in the admission of evidence offered by plaintiff.

2d. That the court erred in refusing to give the instructions to the jury, and each of said instructions severally, as requested by defendant.

3d. That the court erred in directing the jury to find a verdict for the plaintiff.

4th. That the finding of the jury is contrary to the law and the evidence.

Afterwards, on the 24th day of November, 1885, the court overruled said motion for new trial, to which the defendant then and there excepted.

306 Whereupon the plaintiff moved for judgment on the verdict for the plaintiff, which motion the court sustained, and rendered judgment for plaintiff for $20,823.68, damages and the costs of suit to be taxed, to which the defendant then and there excepted.

And forasmuch as the matters aforesaid do not otherwise appear of record, the defendant presents this its bill of exceptions to the court, and asks that the same be signed and sealed, and duly and properly made a part of the record in this case. Which is done accordingly.

ROMANZO BUNN, [SEAL.]
*Judge.*

Endorsed. Filed November 24, 1885.
WM. H. BRADLEY, *Clerk.*

307 Afterwards to wit: on the nineteenth day of March, 1886, there was filed in said clerk's office a bond in said entitled cause, which said bond is in the words and figures following, to wit:

BOND.

Know all men by these presents, that the town of Oregon, in the county of Ogle and State of Illinois, as principal, and Daniel Etnyre and Charles Schneider of Oregon in said county of Ogle, as securities, are held and firmly bound unto Eliza Jennings, in the penal sum of two hundred and fifty dollars ($250.00), lawful money of the United States for the payment of which said principal and its successors, and said securities and their heirs, executors and administrators bind themselves jointly, severally and firmly by these presents. Signed, sealed and delivered the 17th day of March, A. D. 1886.

The condition of the above obligation is such that whereas the said Eliza Jennings did as of the 24th day of November, A. D. 1885, in the Circuit court of the United States for the Northern District of Illinois, at the adjourned October term, A. D. 1885, of said court, recover a judgment against the above bounden town of Oregon for twenty thousand eight hundred and twenty-three dollars and sixty-eight cents ($20,823.68), damages and costs, from which judgment of said Circuit court said town of Oregon has prayed and

obtained a writ of error to the Supreme court of the United States.

308 Now, therefore, if the said town of Oregon shall prosecute its said writ to effect, and answer all costs if said town fails to make its plea good, then this obligation to be void, otherwise to remain in full force and effect.

TOWN OF OREGON, [SEAL.]
By WM. J. MIX, *Supervisor.*
DANIEL ETNYRE, [SEAL.]
CHARLES SCHNEIDER. [SEAL.]

Approved: W. Q. GRESHAM, *Circuit Judge.*

Endorsed: Filed March 19, 1886.
WM. H. BRADLEY, *Clerk.*

309 Afterwards, to wit: On the twentieth day of March, 1886, there was filed in said clerk's office a stipulation in said entitled cause, which said stipulation is in the words and figures following, to wit:

STIPULATION.

IN THE CIRCUIT COURT OF THE NORTHERN DISTRICT OF ILLINOIS.

Eliza Jennings
*vs.*
The Town of Oregon.

And the clerk, in writing up the record for the Supreme court, shall use the printed copy of pleadings in place of and as a substitute for the prior manuscript pleadings.

February 6, 1886. S. W. PACKARD, *Plff's Atty.*
EDSALL & EDSALL, *Attys. for Deft.*

Endorsed: Filed March 20, 1886.
WM. H. BRADLEY, *Clerk.*

310 NORTHERN DISTRICT OF ILLINOIS, ss.

I, William H. Bradley, clerk of the Circuit court of the United States for said Northern district of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the record of all the proceedings had in said court made under the stipulation filed March 20, 1886, in the cause wherein Eliza Jennings is the plaintiff, and the town of Oregon is the defendant, as the same appear from the files and records of said court now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Chicago, in said district, this thirtieth day of March, 1886.

[SEAL.] WM.. H. BRADLEY, *Clerk.*

UNITED STATES OF AMERICA,
311 NORTHERN DISTRICT OF ILLINOIS. } ss.

THE UNITED STATES OF AMERICA.

*To the Judges of the Circuit Court of the United States, for the Northern District of Illinois, Greeting:*

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said Circuit court, between Eliza Jennings, plaintiff, and town of Oregon, defendant, in an action of assumpsit, a manifest error hath happened, to the great damage of the said town of Oregon, defendant, as by its complaint appears, and it being fit that the error, if any there has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1886, in the Supreme court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme court of the United States, this 16th day of March, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the 110th year.

[SEAL.] WM. H. BRADLEY,
*Clerk of the United States Circuit Court for said District.*

UNITED STATES OF AMERICA,
312 NORTHERN DISTRICT OF ILLINOIS. } ss.

*To Eliza Jennings, Greeting:*

You are hereby cited and admonished to be and appear at a Supreme court of the United States, to be holden at Washington, on the second Monday of October, A. D. 1886, pursuant to a writ of error sued out by the town of Oregon, as plaintiff in error against you as defendant in error, and filed in the clerk's office of the Circuit court of the United States, for the Northern district of Illinois, in a certain cause wherein you were plaintiff and the town of Oregon was defendant, in said Circuit court, to show cause, if any there be, why the judgment recovered by you against said town of Oregon in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Hon. Walter Q. Gresham, Circuit Judge, this 18th day of March, in the year of our Lord, one thousand, eight hundred and eighty-six.

WALTER Q. GRESHAM,
*Circuit Judge.*

I hereby admit service upon me of a copy of the within citation this 31st day of March, A. D. 1886.

S. W. PACKARD,
*Attorney for Eliza Jennings.*

313 IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, A. D. 1886.

Town of Oregon, *Plaintiff in Error,*
*vs.*
Eliza Jennings, *Defendant in Error.*
} *Error to the Circuit Court of the United States for the Northern District of Illinois.*

And now comes said Town of Oregon, the plaintiff in error, by James K. Edsall, its attorney, and says, that in the record and proceedings aforesaid, there is manifest error in this, to wit:

*First.* The Circuit court erred in the admission of the following specified items of evidence offered by the plaintiff below, to wit:

1. The transcript of the registry of bonds in state auditor's office (Rec., pages 83–85, Print. Rec. ).
2. The transcript of registry of town officers (Rec., pages 86–89, Print. Rec. ).
3. The bonds and coupons sued upon (original Rec., pages 90–94, Print. Rec. ).
4. Registration of bonds in supervisor's book (Rec., pages 258–259, Print. Rec. ).
5. Elias S. Potter's certificate to state auditor (Rec., pages 260–263, Print. Rec. ).

314 *Second.* The court erred in refusing to give to the jury the instructions requested by the defendant below, numbered from 1 to 23, inclusive; and also erred in refusing to give each of said instructions, severally, as requested by defendant (Rec., pages 293–305, Print. Rec. ).

*Third.* The court erred in its instruction to the jury "to find a "verdict for the plaintiff (below) for the amount of the coupons "sued upon and produced in evidence" (Rec., page 305, Print. Rec. ).

For which said errors, and others appearing in the record aforesaid, the said plaintiff in error prays that the judgment aforesaid may be reversed, etc.

JAMES K. EDSALL,
*Attorney for Plaintiff in Error.*

119-74

IN THE

# SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1886.

TOWN OF OREGON,
*Plaintiff in Error,*
*vs.*
ELIZA JENNINGS,
*Defendant in Error.*

*Error to Circuit Court, U. S., for the Northern District of Illinois.*

# Brief and Argument.

JAMES K. EDSALL,
*For Plaintiff in Error.*

CHICAGO:
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1886.

IN THE

# SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1886.

TOWN OF OREGON, *Plaintiff in Error,*
*vs.*
ELIZA JENNINGS, *Defendant in Error.*
} *Error to Circuit Court, U. S., for the Northern District of Illinois*

## STATEMENT OF CASE.

This was an action of assumpsit brought in the court below by the defendant in error against the plaintiff in error, upon 193 interest coupons for $70 each, detached from bonds purporting to have been issued by the Town of Oregon, to the Ogle and Carroll County Railroad Company, dated Dec. 31, 1870. The declaration contained a special count upon the coupons sued upon, and also the common counts in assumpsit. (Printed Record pp. 3–11.)

The following is a copy of one of the bonds and coupons:

UNITED STATES OF AMERICA.

No. 29. *State of Illinois, County of Ogle.* $1,000.

OREGON TOWN BOND.

Know all men by these presents, that the Town of Oregon in the County of Ogle, and State of Illinois, is indebted to the Ogle and Carroll County Railroad Company, in the full and just sum of one thousand dollars, which sum of money said town agrees and promises to pay on or before

the first day of July, 1883, to the said Ogle and Carroll County Railroad Company, or bearer, with interest at the rate of seven per cent. per annum payable annually onthe first day of July at the office of the Farmers Loan and Trust Company of New York, in the City of New York, upon the delivery of the coupons severally hereto annexed, for which payment of principal and interest, well and truly to be made, the faith, credit and property of said town of Oregon are hereby solemnly pledged under authority of an act of the General Assembly of the State of Illinois, entitled "An act to amend an act entitled an act to incorporate the Ogle and Carroll County Railroad Company," which said act was approved March 30, 1869.

This bond is one of a series numbering from 21 to 60 inclusive for $1,000 each, which bonds, so numbered, together with another series numbered from 1 to 20 inclusive for $500 each, are the only bonds issued by said town of Oregon under and by virtue of said act.

In witness whereof the supervisor and town clerk of the said town of Oregon have hereunto set their hands this thirty-first day of December, A. D. 1870.

E. S. POTTER, *Supervisor.*

FRED. H. MARSH, *Town Clerk.*

State of Illinois, County of Ogle. The Town of Oregon will pay to the Ogle and Carroll County Railroad Company or bearer, Seventy Dollars at the office of the Farmers Loan & Trust Company of New York in the City of New York on the first day of July, 1877, on presentation, being one year's interest on bond No. 29.

E. S. POTTER, *Supervisor.*

F. H. MARSH, *Clerk.* (Ib. pp. 79, 81.)

**The Declaration** avers that forty bonds, for $1,000 each were issued in pursuance of a vote of the people of the Town of Oregon, at an election held June 23, 1870, under certain sections of an act to amend the charter of the railroad company set out in the declaration. (Ib. pp. 3, 6.)

It is also averred in the declaration, that the bonds were registered in the office of the State auditor, June 5, 1871, upon the certificate, under oath, of the supervisor of the town, as required by the statute (Ib. p. 10), and that after such registration the plaintiff in good faith purchased and

became the owner of twenty-four of the bonds from which the coupons in suit were detached.

To this declaration the defendant pleaded the general issue verified by the affidavit of the supervisor of the town and also three special pleas, each setting up a distinct and separate defense. (Ib. pp. 12–30.)

**The Amended Second Plea** states facts which show that the making and execution of the bonds and coupons, in question was obtained by fraud and circumvention. (Ib. pp. 13–24.) The substance of the facts set up in this plea, and proven on the trial, will be stated further on (*Post* p. 35.)

This plea was authorized by section 11 of chapter 73 of the Revised Statutes of Illinois, entitled "Negotiable Instruments," in force when these bonds were issued, in these words:

"If any fraud or circumvention be used, in obtaining the making or executing of any of the instruments aforesaid, such fraud or circumvention may be pleaded in bar to any action to be brought on any such instrument so obtained, whether such action be brought by the party committing such fraud or circumvention, *or any assignee or assignees of such instrument.*"

Gross' Stat. of Ill. (Ed. of 1869), p. 462, § 11.

**The Amended Third Plea** avers facts showing that at the time the bonds were issued the town of Oregon owed, and then had existing, an indebtedness exceeding five per cent. of the assessed value of the taxable property in the town as ascertained by the last assessment for State and county taxes; and that the bonds were not issued *in compliance* with any vote of the people of the town had prior to the adoption of the new constitution of Illinois in 1870, but were issued in direct violation of the vote actually taken on that question. (Printed Rec. pp. 25–28).

This defense was based upon section 12, article IX, of the constitution of Illinois, of 1870, which contains the following provisions:

"No county, city, township, school district, or other municipal corporation, shall be allowed to become indebted in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five *per centum* on the value of the taxable property therein, to be ascertained by the last assessment for State and county taxes, previous to the incurring of such indebtedness. * * * * * * * This section shall not be construed to prevent any county, city, township, school district, or other municipal corporation, from issuing their bonds *in compliance with any vote of the people* which may have been had prior to the adoption of this constitution in pursuance of any law providing therefor."

**The Amended Fourth Plea** shows, that the vote upon the question of making the donation and issuing the bonds, was taken at a special town meeting presided over by a moderator, and not at an *election* within the meaning of the State statutes in that behalf, presided over by the three judges of election authorized to hold elections. (Printed Rec. pp. 29, 30.) And for this reason it is insisted that the donation had not been "authorized *under existing laws*, by a vote of the people," etc., prior to the adoption of the separate section to the constitution of 1870, entitled "Municipal Subscriptions" etc. (*Post* 52.)

**Replications.** The plaintiff filed sixteen replications to the three special pleas, that is, six to the amended second plea, and five to the third and fourth pleas, severally. (Printed Rec. pp. 31–68.)

The fifth replication to the second plea, and the fourth to each of the other two special pleas consisted of the general traverse or replication *de injuria*, etc.

The other thirteen replications in various forms, set up as an estoppel to the several defenses interposed by said three special pleas, the verdict and judgment obtained in a prior suit, brought by one Alexander Wallace, in the same court, against the town, upon other coupons alleged to have been detached from a portion of the same bonds as those from

which the coupons now in suit were detached. It is averred that the plaintiff in this suit was the real owner of the coupons upon which said judgment was so recovered in the name of Wallace, and that such suit was in reality, though not in form, prosecuted in his name for her benefit.

**Demurrer to Replications.** The defendant demurred to the thirteen replications last mentioned upon the ground, among others, that the same did not show, with sufficient certainty and precision, that the same defenses set up in said three special pleas, respectively, were pleaded or actually litigated in said former suit. (Ib. p. 69.)

This demurrer was argued before Mr. JUSTICE HARLAN in May, 1884, who, in July of that year, directed that an order be entered that the demurrer "be overruled, with liberty, however, to the defendant upon the final trial of the case to raise by motion or in other proper form, the same questions that are presented by said demurrer. The question of costs on said demurrer is reserved until the final disposition of the case in this court." (Ib. p. 71.)

Although not appearing in the record, it is perhaps proper to state that the reasons assigned for this disposition of the demurrer to the replications was, that a decision of the demurrer only involved a technical question of pleading; and that it was better that the decision should rest upon the actual facts as they might be made to appear on the trial.

In order to carry out this suggestion of the court, and put the pleadings in such condition that the cause could be fairly tried on its merits, the parties entered into this stipulation:

"It is hereby stipulated and agreed that in order to close up the issues in this case, so that the same may be tried upon the merits, the defendant may file one general rejoinder, traversing or denying all the replications of the plaintiff to the special pleas of the defendant, and that under the issues so formed the respective parties shall be at liberty to introduce upon the trial any legal and competent evidence to

establish the plaintiff's cause or causes of action on one side, and the defense or defenses of the defendant upon the other side, without regard to the formality of the pleadings." (Ib. p. 74.)

Such general rejoinder was accordingly filed (Ib. p. 72), and in pursuance of said stipulation, the cause was tried before Judge Bunn and a jury in November, 1885, (Ib. p. 75.)

The record shows that at the conclusion of the trial, the court refused the several requests for instructions to the jury presented by the defendant; and "instructed the jury to "find a verdict for the plaintiff for the amount of the "coupons sued upon and offered in evidence," to which the defendant duly excepted. (Ib. pp. 159–164.) And that thereupon the jury returned a verdict for the plaintiff for $20,823.68, under such instruction of the court, upon which judgment was rendered. (Ib. pp. 73, 74, 165.)

**The Bill of Exceptions** contains all the evidence offered by either party, including the rulings of the court and the defendant's exceptions thereto, made in the progress of the trial. (Ib. pp. 74–165.) And although the evidence appears to be very voluminous and much of it, as we conceive, useless and unnecessary if not irrelevant, yet there are very few, if any, disputed facts in the case. The vital questions of fact are either settled by the stipulations of the parties, or so clearly proven by the documentary and other evidence, as to preclude any serious controversy as to the facts.

The parties stipulated as follows:

"It is hereby stipulated and agreed by and between the above parties by their respective attorneys that the shorthand reporter's notes of the evidence offered on the trial of the case of Alexander Wallace against the said town of Oregon heretofore tried in this court hereto attached may be used, considered and treated as though the same was evidence taken in this cause in due form.

It is understood, however, that either party may object on the trial to any of the books, papers or documents referred to, or any of the answers of the witnesses given in these reporter's notes, on the ground that the same is not relevant or

material, and either shall be at liberty to offer further and other proof in the cause.

It is further stipulated that the papers hereto attached and marked respectively Exhibits "I," "J," "K," "M," "N," "O," "P," "Q," are each substantially correct copies of the original papers of which the same respectively purport to be copies, and that the paper hereto annexed dated June 1st, 1870, is a copy of the articles of consolidation made and entered into between the Ogle and Carroll County Railroad Company and the original Chicago and Iowa Railroad Company, which was ratified by the stockholders of said companies at their regular annual meetings held some time between the second day of July, A. D. 1870, and December 1, A. D. 1870, and that said copies, and each or either of them, may be read in evidence by either party with like force and effect as the original papers, records or articles, or a duly certified copy thereof from the record.

And it is also admitted that the copies of the petition for election, and the election notice set out in defendant's second plea are also substantially correct copies of the originals of said papers, and that no objection shall be taken on account of any clerical error or variance between said copies and said Exhibits "I" and "J."

It is further admitted as a fact, for the purpose of the trial, that William Schultz was elected as one of the justices of the peace of the town of Oregon, April 5, 1870, and that he duly qualified as justice of the peace by giving bond and taking an oath of office, as required by law, April 9, 1870; that he continued to reside and live in said town of Oregon, in said Ogle county, until after April 3, 1871, and during the year 1871, but that he was absent from said town, and in the city of New York, from December 26, 1870, until about January 6, 1871, and that no successor to said Schultz as justice of the peace of said town was elected until the annual town meeting, held April 4, 1871, and such successor was not qualified by filing his official bond and oath until April 8, 1871, and did not receive his commission until April 15, 1871.

Dated CHICAGO, April 28, 1884.

It is also admitted that George M. Dwight was elected supervisor of the said town of Oregon at the annual town meeting held therein April 4, 1871, and duly qualified as such supervisor by taking an oath of office and giving and filing his official bond as such supervisor on the 10th day of April, 1871, and held such office for the next ensuing year. May 2, 1884. (Printed Rec. 82, 83.)

Exhibit "I" referred to in the stipulation of April 28, 1884, is the petition or application for the election at which the vote was taken upon the question of issuing the bonds and making the donation in question, and contains the following:

"Said bonds *not* to be issued, dated or delivered until said company shall have completed said first division of said railroad, with a T rail, weighing not less than forty-five pounds to the yard, in condition to run trains thereon from a connection or intersection with the Chicago and North-Western railway to a point at and within said town of Oregon, within one-half mile of the east bank of Rock river, and shall have equipped the same with rolling stock sufficient to operate a daily train to and from said town for the accommodation of passengers and freight, nor until said company shall have released said town from all liabilities on account of donations heretofore voted, except a donation of ten thousand dollars voted by said town on the ninth day of December, A. D. 1869; *said vote and donation of forty thousand dollars to be null and void* unless said first division of said railroad shall be completed and equipped as aforesaid on or before the first day of January, A. D., 1871; but in case the same shall be so completed and equipped within the time aforesaid, and said company shall execute and deliver said release, then the said bonds to be deliverable upon the demand of said company, and to bear date of the day of delivery.

"And we request that immediate notice be given of such election, and that the same be held on the 23d day of June, A. D. 1870." (Ib. p. 106.)

Exhibit "J" is the notice of the election to be held in pursuance of this application, and contains the same conditions above quoted from Exhibit "I." (Ib. p. 108.)

Exhibit "K" is a copy of the entry on the town records, showing that on the 23d day of June, 1870, at the time mentioned in the notice, a special town meeting was organized in the town, over which one E. J. Reiman presided as moderator, at which a vote was taken upon the question of making the donation specified in said notice concluding as follows:

"At the hour of six P. M. the moderator proceeded to count out the ballots, until they were all counted, which number equaled the numbers on the poll-list. The ballots were then read by the moderator, and resulted as follows: There being for donation, *as stated in the notice*, one hundred and sixty-three votes; against donation, *as stated in the notice*, twelve votes. The result being publicly read, the meeting was then closed. E. J. REIMAN, *Moderator*.

Attest, F. H. MARSH, *Town Clerk*." (Ib. p. 109.)

It clearly appears that the terms and conditions of the vote thus taken were not complied with; and that the first division of the road was not completed as specified in the notice on or before the first day of January, 1871, nor for several months thereafter. (Ib. p. 151.)

It thus appears, that under the facts in relation to the completion of the road, as they actually existed, the vote taken by the people of the town declared that the vote and proposed donation should be void, and directed that the bonds should *not* be issued. The parties further stipulated as follows:

"In order to avoid unnecessary expense, it is hereby stipulated and admitted that the bonds and coupons referred to in the plaintiff's declaration, numbered from 29 to 37 inclusive, and 46 to 60 inclusive, are signed with the genuine signatures of E. S. Potter and F. H. Marsh, as they purport to be, but nothing is hereby admitted as to the official character of said parties who so signed said bonds and coupons.

"It is also stipulated and admitted that Alexander Wallace, on the 18th day of January, 1873, brought suit in this court upon certain coupons belonging to certain bonds purporting to have been issued by said town of Oregon, and that the pleadings in said case were the declaration containing a special count upon the coupons so sued upon in that suit, and the common counts in assumpsit, and the general issue of non-assumpsit duly sworn to. That the annexed paper contains a correct report of Judge Blodgett's charge to the jury in that case, which, so far as competent and pertinent to the issues, may be read in evidence, but the defendant reserves the right to object to said charge on the ground that the same is immaterial, incompetent and irrelevant to the issues in this suit.

"It is further admitted on the part of the plaintiff in this suit that the value of the taxable property in said town of Oregon, as ascertained by the last assessment of taxable property within said town, for State and county taxes, previous to the issue of the bonds and coupons sued upon in this case, to-wit, for the year 1870, was less than ($200,000) two hundred thousand dollars, that is to say, the taxable property in said town was for said year assessed by the town assessor of said town at ($159,379) one hundred and fifty-nine thousand three hundred and seventy-nine dollars; that such assessment was for said year equalized by the board of supervisors of the county of Ogle, in which said town was situated, at the sum of, and reduced to, ($141,985) one hundred and forty-one thousand nine hundred and eighty-five dollars; and that the said equalized assessment so made by the board of supervisors was for said year equalized by the board of equalization of the State of Illinois at, and increased to, the sum of ($187,310) one hundred and eighty-seven thousand three hundred and ten dollars, as appears from the assessor's and collector's books for said town, and the records and files of said Ogle county; upon which said last-mentioned equalized assessment the State and county taxes were extended and collected in said town for said year.

"And it is further admitted that at the time of the issuing of the bonds and coupons sued upon in this case, the said town of Oregon then owed and had existing an indebtedness to the amount of ($10,000) ten thousand dollars for principal, with the accrued interest thereon, represented by twenty bonds of said town, numbered from 1 to 20 inclusive, for $500 each, dated December 16, A. D. 1869, payable ten years after date, with interest at ten per cent. per annum, payable annually, in accordance with the interest coupons thereto attached, and which last-mentioned bonds are the same bonds referred to as the bonds "numbered from 1 to 20 inclusive," in the bonds to which the coupons were attached upon which this suit is brought.

"It is further admitted that the 'Town of Oregon,' mentioned in § 2 of the act entitled 'An act to amend an act entitled An act to incorporate the Ogle and Carroll County Railroad Company,' approved March 30, 1869, is the village of Oregon, on the west side of Rock river, situated within the township of Oregon, the defendant in this suit, which said township is situated on both sides and extends two miles east of said Rock river.

"It is further admitted that no vote was taken in the town of Oregon upon the question of issuing the bonds involved in this suit subsequent to the vote taken June 23, 1870, which said vote was taken on the written application and election notice, copies of which are attached to stipulation, dated April 28, 1884." (Ib. pp. 114, 115).

The plaintiff testified that she bought the bonds for value, before maturity, and without notice of the defenses set up. Each of the three special pleas were fully sustained by the admitted facts and uncontroverted evidence.

It was not seriously contended in the court below, and we presume it will not be here, that the evidence showed that either of the defenses interposed by the special pleas in this case, were pleaded and actually litigated in the former suit in such manner as to form an estoppel in the present suit. The evidence shows the contrary. (Ib. pp. 155–157.)

There is nothing in the recital, contained in the bonds, which can be held to estop the town from showing that the same were not issued *in compliance with a vote of the people of the town* at an election held therein prior to the adoption of the new Constitution of Illinois in 1870. Upon these questions the recitals are silent. (*Ante*, p. 2.)

The plaintiff read in evidence from the so-called supervisor's book of the town, the entries therein on pages 264 to 301, showing a list of the bonds in question which were preceded with the following caption:

"List of bonds of the town of Oregon, in the county of Ogle, and State of Illinois, issued to the Ogle and Carroll County Railroad Company, *in pursuance of an election* held by the legal voters of said town, on the 23d day of June, A. D. 1870, under the provisions of an act of the general assembly of the State of Illinois, entitled 'An act to amend an act entitled an act to incorporate the Ogle and Carroll Railroad Company.'"

[Here follows a list of bonds numbered 21, 22 and 23, and the record then recites thus:]

"Here follows in said registration, pages 266 to 301, of said supervisor's book inclusive, containing a similar registration of the bonds numbered 24 to 60 inclusive, and no

signature of any officer appears signed to said registration or caption thereto, nor is there any signature to the registration of the other bonds registered in said book. To which counsel for defendant objected upon the ground that the said registration and the caption thereto was not signed by, nor did it appear to be made by the supervisor or any officer of the town of Oregon, authorized by law to make the same in behalf of the town; and also objected to the introduction of the caption to said registration upon the ground that there was no law authorizing any such caption or statement to be made in connection with the registration of said bonds; which objections the court overruled; to which the defendant then and there excepted, and the same was read in evidence as hereinbefore stated." (Printed Rec. p. 140.)

In addition to these objections it was subsequently shown by the evidence that these entries were made in the supervisor's book by James H. Cartwright, the attorney for the railroad company, and one of the justices of the town, and not by the supervisor; that the said entries were not made until *after* Geo. M. Dwight was elected and qualified as supervisor; and that he did not authorize the entry or have anything to do with making the same; but found the same in the book, in Cartwright's handwriting, when he first obtained possession thereof, from Cartwright's office, in September, 1871. (Ib. pp. 142, 143, 153.)

The records show that:

"Plaintiff also offered in evidence a certified copy of the following paper transmitted to and filed in the office of the auditor of public accounts of the State of Illinois, June 5, 1871:

April 1, 1871.

" *To the Auditor of Public Accounts of the State of Illinois.*

"SIR: I hereby certify that the following described bonds are entitled to registration in your office under the provisions of an act entitled 'An act to fund and provide for paying the railroad debts of counties, townships, cities and towns,' in force April 16, 1869, the bonds being numbered: [Here follows a list of the bonds] being in all forty bonds amounting to $40,000 and bearing interest at the rate of seven per cent. per annum, payable annually on the first

day of July. These bonds are issued by the town of Oregon in the county of Ogle and State of Illinois, to the Ogle and Carroll County Railroad Company, under and by authority of the provisions of an act to amend an act entitled 'An act to incorporate the Ogle and Carroll County Railroad Company.' Approved March 30, 1869, and by a vote of the people of said town at an election held on the 23d day of June, 1870. And I as supervisor of said town do hereby certify that all the preliminary conditions in the act 'in force April 16, 1869,' required to be done to authorize the registration of these bonds and to entitle them to the benefits of said act last referred to, have been fully complied with to the best of my knowledge and belief.

"ELIAS S. POTTER,
"*Supervisor of the town of Oregon, Illinois.*

"Subscribed and sworn to by the said Elias S. Potter, before me this first day of April, A. D. 1871.

"JAMES H. CARTWRIGHT, [SEAL.]
"*Justice of the Peace.*

"Endorsed. Filed June 5, 1871.

"C. E. LIPPINCOTT,
"*Auditor of Public Accounts.*"

"To which counsel for defendant objected, upon the ground (1) that said certificate bears date and purports to have been sworn to April 1, 1871, two days before said E. S. Potter had any color of appointment to the office of supervisor, and does not appear to have been transmitted to or filed in the office of the State auditor until June 5, 1871, and nearly two months after George M. Dwight was elected and qualified supervisor of said town, as appears from the evidence and the stipulation of the parties.

(2) That the certificate on its face appears to have been made upon "the best knowledge and belief" of said Potter, and it does not state positively that the matters therein stated are true.

(3) That said certificate is otherwise incompetent and irrelevant.

"The court admitted the said certificate in evidence subject to said objections for the present, at the same time stating that the presumption is that the certificate was made and sworn to on the date it bears date, April 1, 1871; and that, unless it was made to appear by other evidence that it was, in fact, made and sworn to after Potter received his appointment, it could not be regarded as the act of the supervisor

of the town, and would not be evidence against the town.

"To which ruling of the court the defendant then and there excepted, and the same was read in evidence, as hereinbefore stated." (Printed Rec. pp. 141, 142.)

No further evidence was offered as to the time when said Potter made and swore to such certificate.

It was clearly proven, and an undisputed fact on the trial, that Potter did not have any color of authority to act as supervisor of the town until the night of April 3, 1871. (Ib. pp. 145, 147.) It is agreed that the next day thereafter, at the annual town meeting, held April 4, 1871, George M. Dwight was elected supervisor of the town and duly qualified as such by taking an oath of office and giving his official bond on the 10th day of April, 1871, and held such office for the next ensuing year. (Ib. p. 83.) It thus appears that both at the date of this certificate made by Potter, and when it was sworn to before Cartwright, April 1, 1871, as well as at the time it was transmitted to and filed in the office of the State auditor, June 5, 1871, said Potter had no color of right to exercise any of the powers of the supervisor of the town. It is clear that Potter's acts at those dates can not be treated as the acts of the town supervisor. George M. Dwight, the supervisor in office, June 5, 1871, when this paper was transmitted to the State auditor, testified that he had nothing to do with, and did not authorize either the making of this certificate, or the transmitting of the same to the auditor of public accounts. (Ib. p. 143.)

**As to the questions arising under the second plea** the defendant requested the court to charge the jury:

1. A defendant is not estopped by a judgment and verdict in a former suit, from making a defense in a subsequent suit upon a different cause of action, which was not pleaded, and could not under the rules of law have been made under the pleadings in such former suit.

2. And although it may appear from the evidence that the same circumstances tending to show fraud and circumvention were in fact proven in such former suit, as are now offered in evidence in this suit, the verdict in such former suit may have been found for the plaintiff therein upon the ground that the statutory defense that the making and exe-

cution of the coupons sued upon in that suit was obtained by fraud and circumvention, was not pleaded therein in such manner as to enable the defendant to avail itself of that defense against a *bona fide* holder of the coupons for value. Under such a state of the pleadings, the verdict and judgment in such former suit would not estop the defendant from pleading and setting up in a suit brought upon other coupons, and a different cause of action, the defense that the making and execution of the coupons now offered in evidence was obtained by fraud and circumvention.

3. If the jury find from the evidence that the making and execution of the bonds and coupons offered in evidence was obtained by fraud and circumvention in the manner and as alleged in the second plea, the jury should find the issues of the defendant on that plea.

**As to the questions arising upon the third plea,** the defendant requested the court to charge the jury:

4. That section 12 of article 9 of the constitution of the State of Illinois, adopted in 1870, contains the following provisions:

"No county, city, township, school district, or other mu-
"nicipal corporation, shall be allowed to become indebted
"in any manner, or for any purpose, to an amount, includ-
"ing existing indebtedness, in the aggregate exceeding five
"per centum on the value of the taxable property therein,
"to be ascertained by the last assessment for State and
"county taxes, previous to the incurring of such indebted-
"ness. * * * This section shall not be construed to
"prevent any county, city, township, school district, or oth-
"er municipal corporation, from issuing their bonds in
"compliance with any vote of the people, which may have
"been had prior to the adoption of this constitution in pur-
"suance of any law providing therefor."

The constitution containing this section took effect, and has been in force since August 8, 1870.

5. It appears from the admission and stipulation of the parties read in evidence, that at the time of the issuing of the bonds and coupons sued upon in this case, the town of Oregon then had existing and owed an indebtedness exceeding five per centum of the value of the taxable property in the town, as ascertained by the last assessment for State and county taxes previous to the issuing of said bonds and coupons—that is, as appears by the assessment for the year 1870.

Under this state of facts, the town of Oregon then had no power or authority to issue the said bonds and coupons, except so far as such power was reserved by the last paragraph of said section 12, article 9 of the constitution.

By virtue of that provision the power was only reserved to issue said bonds "*in compliance*" with a vote of the people of the town, had prior to the adoption of said constitution, in pursuance of some law providing therefor.

No power was thereby reserved to issue such bonds otherwise than in compliance with such vote, nor to issue the same in violation of the conditions imposed by such vote.

6. The plaintiff in this suit is chargeable with notice of the provisions of the State constitution and of the assessed value of the taxable property in the town, and was bound to know that the supervisor and town clerk of the town, at the date of the bonds in question, had no power to issue the same and thereby to create a debt in excess of five per cent. of such assessed value of the taxable property in the town, unless the same were issued *in compliance* with such vote of the people, had prior to the adoption of the said constitution.

7. The bonds in question contain no recital or statement showing that the same were issued in compliance with any vote of the people of said town, had prior to the adoption of said constitution; and there is nothing upon the face of the bonds or coupons which estops the town from showing that the bonds were not issued in compliance with such vote, but that the terms and conditions upon which the donation and bonds were in fact voted, were not complied with.

8. The general laws of the State of Illinois in force since April 16, 1869, contain this provision:

"And any county, township, city or town shall have the "right upon making any subscription or donation to any "railroad company, to prescribe the conditions upon which "such bonds, subscriptions or donations shall be made, and "such bonds, subscriptions or donations shall not be valid "and binding until such conditions precedent shall have "been complied with."

Rev. Stat. Ill., Chap. 113, ¶ 17.

9. It appears from the copy of the notice of the election held June 23, 1870, read in evidence, that such notice contained the following provisions: [Here follow conditions of vote as shown *ante*, p. 8.]

10. It also appears from the copy of the record made of the canvass of the votes cast at said election, read in evidence, that said election resulted as follows: "For donation *as stated in the notice,* one hundred and sixty-three votes. Against donation *as stated in the notice,* twelve votes."

11. The town had the right under the law to thus prescribe the condition precedent upon which the donation might be made and the bonds issued.

12. If the jury find from the evidence that the first division of the Ogle and Carroll County Railroad was not completed, as prescribed in said notice of election, from a connection or intersection with the Chicago and Northwestern Railway to a point at and within said town of Oregon within one half mile of the east bank of Rock river, on or before the first day of January, A. D. 1871, as required by the terms of said notice of election, and the vote before mentioned; then the jury are instructed, that in view of the admitted facts in this case in respect to the assessed value of the taxable property in the town, and the amount of its then existing indebtedness, such vote, after the failure to comply with the conditions thereof, constituted no authority to the supervisor and town clerk of said town to issue said bonds; and any attempt on their part to issue the same at any time after August 8, 1870, without compliance with the conditions of the vote authorizing the same, is void and of no effect.

13. The jury are further instructed, that by virtue of the provisions of said § 12, Art. IX of the constitution, when applied to the admitted facts of the case in respect to the indebtedness of the town, and the assessed value of the taxable property in said town of Oregon, the supervisor and town clerk of said town had no power or authority at any time after August 8, 1870, to waive compliance with the conditions of said vote, and issue the bonds, when such vote had not been complied with.

14. And the jury are further instructed, that if they find from the evidence that the bonds and coupons offered in evidence were issued after August 8, 1870, without compliance with the vote of the people of the town, prescribing the conditions upon which the same might be issued, the same are void, and the plaintiff can not recover thereon in this action.

15. A former recovery upon one cause of action will not estop the defendant from setting up and proving, in a sub-

sequent suit upon a different cause of action, a defense which might have been, but in fact was not relied upon or proven, and actually litigated in such former suit.

16. Unless the jury find from the evidence that the defense set up in the amended third plea, based upon the provisions of § 12, Art. IX of the State constitution prescribing limitations upon municipal indebtedness, was attempted to be proven and actually litigated in the former suit brought in the name of Wallace, referred to in the evidence, the verdict and judgment in such former suit would not estop the defendant from making that defense in this suit.

17. The burden of proof rests upon the plaintiff to show that the same defense or defenses were actually relied upon, and litigated in, the said former suit, before the verdict and judgment in such former suit can be held to estop the defendant from making such defenses in this suit.

18. Neither the recitals contained in the bonds offered in evidence, nor the statements contained in the certificate purporting to be signed and sworn to by E. S. Potter as supervisor, a certified copy of which was offered in evidence; nor the certificate of the auditor of public accounts indorsed upon said bonds, were sufficient in law to estop the defendant from making the defense set up in the amended third plea, and showing that said bonds and coupons were issued in violation of section 12 article IX of the constitution of the State of Illinois.

*Dixon County* v. *Field*, 111 U. S. 83, *91*, *92*, etc.
*Carroll County* v. *Smith*, 111 U. S. 556.
*Buchanan* v. *Litchfield*, 102 U. S. 278.
*Northern Bank* v. *Porter Tp.*, 110 U. S. 608.

The court was also requested to give to the jury each of the foregoing instructions numbered from one to eighteen, severally.

**As to the questions arising upon the fourth plea** the defendant requested the court to give the jury each of the following instructions:

19. The jury are instructed that the election authorized to be held in the town of Oregon by section six of the act read in evidence, entitled "An act to amend an act entitled an act to incorporate the Ogle and Carroll County Railroad Company" was required by the laws of Illinois to be pre-

sided over by the three judges of election of said town; and that such election could not be lawfully held and presided over by a moderator in the manner prescribed by law for holding town meetings.

20. The jury are therefore instructed that if it appears from the evidence that the vote taken upon the question of making a donation by the town of Oregon of $40,000 in bonds to said railroad company was not presided over by judges of election as required by law in relation to elections, but was held and presided over by a moderator as required by law in relation to town meetings, the same was not an election held in pursuance of law and would not constitute any authority for making the proposed donation and issuing the bonds of the town, after the adoption of the new constitution of Illinois on the second day of July, 1870.

21. The recitals contained in the bonds produced in evidence are not sufficient to estop the town of Oregon from making the defense in this action set up in the fourth plea, notwithstanding the plaintiff may appear to be a *bona fide* holder of the said bonds and coupons thereto attached, for value.

The defendant also requested the court to give each of the following instructions to the jury.

22. If the jury believe from the evidence that the entry of registration and recital read in evidence from pages 264 to 301 of the supervisor's book, read in evidence, were written in said book by J. H. Cartwright after George M. Dwight became supervisor of the town of Oregon, and while said Dwight was such supervisor, and that the same were written by said Cartwright in said book without the knowledge, consent or authority of the supervisor of said town then in office, such entry and registration of said bonds, so made in said book without authority of the supervisor, would not estop the town from making the defenses set up in this case.

23. And even in case the supervisor had authorized said Cartwright to write such recital and make such registration in said book, the same would not estop the town from showing the recital as to the bonds mentioned therein, being made in pursuance of the election therein referred to, was in fact untrue. The town supervisor in the registration of the bonds had no authority to make any recital upon that subject which would be obligatory upon the town as an estoppel.

The court refused to give any or either of said instructions

to the jury, so asked by the defendant, to which refusal the counsel for defendant then and there excepted; and the court thereupon instructed the jury to find a verdict for the plaintiff for the amount of the coupons sued upon and produced in evidence, with interest thereon at six per cent. per annum from the date of each coupon, which was all the interest claimed by the plaintiff. To which charge and instruction by the court, that the jury should find a verdict for the plaintiff as aforesaid, the defendant, by its counsel, then and there excepted. (Printed Rec. 159–164.)

It appears that the jury thereupon found a verdict for the plaintiff as before stated, upon which the judgment was rendered.

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## ASSIGNMENT OF ERRORS.

And now comes said Town of Oregon, the plaintiff in error, by James K. Edsall, its attorney, and says, that in the record and proceedings aforesaid, there is manifest error in this, to-wit:

*First.* The Circuit Court erred in the admission of the following specified items of evidence offered by the plaintiff below, to wit:

1. The transcript of the registry of bonds in State auditor's office (Print. Rec. 76).

2. The transcript of registry of town officers (Print. Rec. 78).

3. The bonds and coupons sued upon (Print. Rec. 79, 81).

4. The caption to registration of bonds in supervisor's book (Print. Rec. 140).

5. Elias S. Potter's certificate to State auditor (Print. Rec. 141).

*Second.* The court erred in refusing to give to the jury the instructions requested by the defendant below, num-

bered from 1 to 23, inclusive; and also erred in refusing to give each of said instructions, severally, as requested by defendant (*ante* pp. 14–20, Print. Rec. 159–164).

*Third.* The court erred in its instruction to the jury "to "find a verdict for the plaintiff (below) for the amount of "the coupons sued upon and produced in evidence" (*ante* p. 20, Print. Rec. 164).

For which said errors, and others appearing in the record aforesaid, the said plaintiff in error prays that the judgment aforesaid may be reversed, etc.

JAMES K. EDSALL,
*Attorney for Plaintiff in Error.*

# BRIEF FOR PLAINTIFF IN ERROR.

## I.

AS TO THE DEFENSE MADE BY THE AMENDED SECOND PLEA.

1. This plea averred facts which show that the making and execution of the bonds and coupons in question was obtained by fraud and circumvention. (Printed Rec. 13-24.) This defense is based upon Section 11, Chap. 73, Rev. Stat. Ill., in force in 1870. (*Ante*, p. 3, *post*, p. 34.)

Under the statute, the defense that the *making* or *executing* of the instrument was obtained by fraud and circumvention is good against a *bona fide* holder for value, to whom the same has been transferred before maturity, without notice of the alleged fraud. It is otherwise where the fraud relates solely to the consideration.

*Hubbard* v. *Rankin*, 71 Ill. 129.
*Taylor* v. *Atchison*, 54 Ill. 196.
*Van Brunt* v. *Singley*, 85 Ill. 281.
*Richardson* v. *Schirtz*, 59 Ill. 313.
*Easter* v. *Minard*, 26 Ill. 495.
*DePuy* v. *Schuyler*, 45 Ill. 306.

2. The plea shows that the railroad company (knowing that it was not entitled to the bonds), through its attorney, president and directors, entered into a fraudulent conspiracy to confer color of authority as supervisor of the town on their director, Potter, in order to procure him to sign the bonds in behalf of the town; and that the pretended appointment of Potter as supervisor and the execution of the bonds by him took place at the same time, and as parts of the same transaction.

3. It appears that aside from the question of fraud, Potter's appointment as supervisor was invalid. The statute then in force provided that, in case of a vacancy in any

town office, "it shall be lawful for the *justices* of the peace "of the town, together with the supervisor and town clerk' "to fill the vacancy by appointment under their hands and "seals."

Gross' Stat. of Ill. (Ed. of 1869), p. 750, Art. VII, Sec. 1.

William Shultz was one of the justices of the peace of the town. He had tendered his resignation, but his successor had not been elected and qualified.

Under the constitution and laws of Illinois, a justice of the peace continues in office until his successor is elected and qualified, notwithstanding an attempted resignation.

*People* v. *Barnett*, 101 Ill. 332.
*Badger* v. *U. S. ex rel. Bolles*, 93 U. S. 599.
Const. of 1848, Art. IV, § 27.
Const. of 1870, Art. VI, § 32.

Shultz was therefore still in office, and one of the officers whom the people of the town had the right to have consulted in respect to the filling of any supposed vacancy in the office of supervisor.

4. It appears, affirmatively, that Shultz had nothing to do with Potter's appointment; that it was made without his knowledge, and that he was not notified or requested to be present.

"The law is well settled that where a statute constitutes a board of commissioners or other officers to decide any matter or perform an official act, but makes no provision that a majority of such officers shall constitute a quorum, *all must be present to hear and consult* (or at least notified to be present), though a majority may then decide."

*Crocker* v. *Crane*, 21 Wend. 211, 218.
*Babcock* v. *Lamb and Doty*, 1 Cowen, 238.
*Ex parte Rogers*, 7 Cowen, 526 and note.
*Louk* v. *Woods*, 15 Ill. 262.
*Williams* v. *School Dist.* 21 Pick. 82.
*McCoy* v. *Curtice*, 9 Wend. 17.

"The public can only act through its authorized agents, "and it is not bound until all who are to participate in "what is to be done have performed their respective "duties."

*Anthony* v. *County of Jasper*, 101 U. S. 698.

Potter's appointment was therefore invalid, and he never acquired the legal right to act as supervisor of the town. He was not a supervisor *de jure*. The utmost that can be claimed is, that he thereby acquired such color of title that he might become supervisor *de facto*.

5. The reasons of public policy which sustain the validity of the acts of a *de facto* officer in favor of third persons dealing with such officer in good faith, have no application to parties who fraudulently conspire together to make a colorable appointment of one of their own number, in order that they may procure him to perform the alleged official act for their benefit, under the fraudulent color of title they have conferred upon him for that purpose.

This plea was fully sustained by the evidence (Print. Rec. pp. 143–158).

## II.

### AS TO THE QUESTIONS ARISING UNDER THE THIRD PLEA.

1. This plea shows that the bonds and coupons in question were issued in violation of § 12, Art. IX of the State constitution adopted in 1870, which prohibits municipal corporations from creating indebtedness to exceed five per cent. on the assessed value of the taxable property therein. (*Ante* p. 4, and *post* p. 41.)

It is shown that when the bonds were issued, the town was already indebted in excess of the constitutional limitation, and that the bonds were not issued "in compliance with any vote of the people" of the town had prior to the adoption of the constitution, within the purview of the saving clause of that section.

The adoption of the State constitution containing this sec-

tion, deprived the town of all power to create any further indebtedness in excess of the constitutional limit, except so far as such power was reserved by the last paragraph of the section.

*Buchanan* v. *Litchfield*, 102 U. S. 278.
*School District* v. *Stone*, 106 U. S. 183.
*Litchfield* v. *Ballou*, 114 U. S. 190.
*Prince* v. *City of Quincy*, 105 Ill. 138, 215.

2. By the express terms of the vote the bonds were *not* to be issued, dated, or delivered, and * * * "*said vote* and donation of forty thousand dollars be *null and void* unless said first division of said railroad shall be completed and equipped as aforesaid on or before the first day of January, A. D. 1871." (*Ante* p. 8.)

It appears that the railroad company wholly failed to comply with the terms of the vote.

Upon the facts as they then existed, § 12, Art. IX of the constitution prohibited the issue of the bonds.

3. The question as to whether *power* exists in a municipality to issue bonds and create indebtedness, may depend on extrinsic facts, not appearing on the face of the law.

*Northern Bank* v. *Porter Tp.*, 110 U. S. 608.
*Dixon County* v. *Field*, 111 U. S. 96.
*Merchants Bank* v. *Bergen County*, 115 U. S. 390.
*Daviess County* v. *Dickinson*, 117 U. S. 657.

In this instance, the power to issue the bonds depended upon compliance with the vote of the people of the town had in pursuance of law, prior to the adoption of the constitution.

The purchaser was bound to know from the terms of the constitution itself that there was no power or authority to issue the bonds unless it could be done in compliance with such vote. He was bound to take notice of the terms of the vote which appeared of record.

*Daviess County* v. *Dickinson*, 117 U. S. 657.

He was bound to take notice, not only of the constitu-

tional limitation upon municipal indebtedness, but of such facts as the authorized official assessment disclosed concerning the valuation of taxable property within the town.

*Buchanan* v. *Litchfield*, 102 U. S. 289.
*Dixon County* v. *Field*, 111 U. S. 95.

"If the power exists in the municipality the *bona fide* "holder is protected against mere irregularities in the man- "ner of its execution; but if there is *a want of power, no* "*legal liability can be created.*"

*Anthony* v. *Jasper County*, 101 U. S. 697.
*Northern Bank* v. *Porter Tp.*, 110 U. S. 618.
*Merchants Bank* v. *Bergen County*, 115 U. S. 384.

4. It was held by the Supreme Court of Illinois at its September term, 1870, and before the bonds in question were issued, that a railroad corporation was not entitled to bonds of a town voted on conditions, without compliance with the vote.

*The People* v. *Dutcher*, 56 Ill. 149.

This ruling has been constantly adhered to.

*People* v. *Glann*, 70 Ill. 232.
*People* v. *Holden*, 91 Ill. 446.

The established construction of the constitution of 1870 in the Supreme Court of the State is, that municipal corporations were thereby deprived of all power to create such indebtedness without compliance with the conditions of the vote authorizing the same.

"The obligations assumed under existing laws can not, since the adoption of the constitution, be enlarged or materially changed, either by the action of the people of the township or its corporate authorities. All power is taken away, and the utmost that can be done is to make and complete the subscription or donation previously voted under then existing laws, *upon the same terms and conditions as voted.* Subscriptions or donations upon any other terms would obviously require new consent on the part of the

people of the municipality, which can not be had for want of power.

*Middleport* v. *Ætna Life Ins. Co.*, 82 Ill. 562.
*The People* v. *Jackson*, 92 Ill. 451.
*Town of Prairie* v. *Lloyd*, 97 Ill. 191.
*Wade* v. *LaMoille*, 112 Ill. 79.

5. The supervisor and town clerk had no implied authority to waive compliance with the conditions prescribed by the vote of the people. The statute then in force expressly declared that "such bonds, subscriptions or donations shall *not be valid and binding* until such conditions precedent *shall have been complied with*." (*Post* p. 46.)

Rev. Stat. of Ill., Chap. 113, ¶ 17.
*Town of Eagle* v. *Kohn*, 84 Ill. 292.

Upon the admitted facts § 12, Art. IX, of the constitution absolutely prohibited the issue of the bonds otherwise than in compliance with such vote. There can be no implied authority to waive the performance of that, which both the statute and the constitution of the State, made an essential prerequisite to the existence of power to issue the bonds and create the indebtedness.

## III.

AS TO QUESTIONS ARISING UNDER THE FOURTH PLEA.

The issue of the bonds was prohibited by the separate article to the constitution of 1870, entitled "Municipal Subscriptions to Railroads," etc., unless the donation had been previously "authorized under existing laws by a vote of the people." (*Post* p. 52.)

The statute authorizing the town to make a donation required the vote to be taken at an election. (Print. Rec. p. 4.)

Exhibit K (Ib., 109), and the testimony of the town clerk, Marsh (Ib., 146), show that the only vote taken was at a special town meeting, presided over by a moderator, and not at an election presided over by the three judges of election.

The established construction of the statutes bearing on the question, in the State court is, that a vote taken at such town meeting is not a vote taken at an election within the meaning of such statutes; and consequently where the statute requires the vote to be taken at an election such vote taken at a town meeting is not a vote "under existing laws" as required by the saving clause to said section.

*C. & I. Ry. Co.* v. *Mallory*, 101 Ill. 583.
*Lippincott* v. *Pana*, 92 Ill. 24.

## IV.

### THE TOWN IS NOT ESTOPPED BY THE RECITALS CONTAINED IN THE BONDS FROM MAKING THE DEFENSES NOW INTERPOSED.

The recitals do not show that the bonds were issued in compliance with a vote of the people, had prior to the adoption of the constitution, in pursuance of a law providing therefor; nor that the same were authorized under existing laws by a vote of the people prior to the adoption of the constitution. (*Ante* p. 2, *post* p. 57.)

1. Assuming for the present purpose that the recital is sufficient to show that the bonds were issued in accordance with the provisions of the act therein mentioned, this would fall far short of showing that the same were *issued in compliance with a vote of the people of the town at an election held in pursuance of that act prior to the adoption of the constitution in 1870*. The act required an election to be held before the bonds were issued, but did not require the same to be held before the adoption of the constitution in 1870. This requirement was imposed by the constitution itself. The recital does not purport to show compliance with the vote of the people nor with the constitutional requirement in any respect, and can not be so enlarged by construction as to embrace the same.

*Buchanan* v. *Litchfield*, 102 U. S. 292.
*School District* v. *Stone*, 106 U. S. 183.
*Northern Bank* v. *Porter Township*, 110 U. S. 608.
*Dixon County* v. *Field*, 111 U. S. 83.
*Bates* v. *Ind. School Dist.*, 25 Fed. Rep. 192.
*Liebman* v. *San Francisco*, 24 Fed. Rep. 711.

2. The supervisor and town clerk issuing the bonds were not authorized to decide, conclusively, the question as to whether these constitutional requirements had been complied with.

The vote under which it is claimed the bonds were issued was taken June 23, 1870.

If that vote was properly taken at a town meeting, then the moderator who presided at that meeting, canvassed the vote and decided all questions pertaining thereto, and the clerk made a record thereof in the town records.

If the vote should have been taken at an election, then the election returns, made by the judges thereof, constitute the record of such election. (*Post* pp. 53, 55.)

In no contingency was the supervisor or town clerk in office April 3, 1871 (when it is conceded the bonds in question were signed), authorized by law to make any decision as to the result or validity of an election held prior to July 2, 1870.

The law imposed that duty, and conferred that authority, upon the officers who held and presided at that election; and it made their returns or minutes duly subscribed by them and lodged in the proper office, legal evidence of the vote taken at such election.

> Gross' Stat. of Ill. (Ed. of 1869,) p. 748, §§ 14–22.
> *Ibid.* p. 247, ¶¶ 28–32.

Nor was there any law making the supervisor or town clerk the tribunal to determine whether the conditions of the vote had been complied with. They may have been required, incidentally, to ascertain that fact, as also to ascertain from the records whether the vote had been taken under or in pursuance of existing laws, in order to enable them to determine their own duties in respect to the signing of the bonds. They were not, however, the tribunal primarily charged with the duty of deciding these questions.

"The adjudged cases, examined in the light of their special circumstances, show that the facts which a munic-

ipal corporation, issuing bonds in aid of the construction of a railroad, was not permitted, against a *bona fide* holder, to question, in face of a recital in the bonds of their existence, *were those connected with or growing out of the discharge of the ordinary duties of such of its officers* as were invested with authority to execute them, and which the statute conferring the power made it their duty to ascertain and determine before the bonds were issued; *not merely for themselves, as the ground of their own action in issuing the bonds,* but, equally, as authentic and final evidence of their existence, for the information and action of all others dealing with them in reference to it."

*Northern Bank* v. *Porter Township*, 110 U. S. 616.
*Dixon County* v. *Field*, 111 U. S. 94.
*Dariess County* v. *Dickinson*, 117 U. S. 657.

It follows, therefore, that it was not within the power of these officers to make any statement or recital in the bonds covering these points, which would estop the town from showing the truth in the defense of this action.

## V.

THE TOWN IS NOT ESTOPPED BY THE CERTIFICATES CONNECTED WITH THE REGISTRATION OF THE BONDS FROM SHOWING THE TRUTH IN ITS DEFENSE.

The law of April 16, 1869, authorizing registration of the bonds is contained in Rev. Stat. Ill., Chap. 113, ¶¶ 11–22. (*Post* p. 66.)

1. It appears that the bonds were registered by the State auditor June 5, 1871, upon a certificate signed by E. S. Potter as supervisor of the town, dated and purporting to be sworn to April 1, 1871, but not transmitted to, or filed in office of the auditor of public accounts until June 5, 1871. At neither of these dates did Potter have any pretense or color of title to the office of supervisor of the town. (*Ante* pp. 12–14.)

Whatever might be the effect of the sworn certificate made by the supervisor of the town, and transmitted by him to the State auditor, as required by the statute, it will

not be held that the town is estopped by the secret and fraudulent act of one, who, at the time had no color or pretense of title to the office of supervisor.

*Anthony* v. *Jasper County*, 101 U. S. 693.
*Merchants Bank* v. *Bergen County*, 115 U. S. 390.

2. The certificates connected with the registration of the bonds, if made by the proper officers, would not estop the town in an action upon the bonds.

*Dixon County* v. *Field*, 111 U. S. 83, 91.
*Daviess County* v. *Dickinson*, 117 U. S. 657.
Bigelow on Estoppel, pp. 242–252, 255.

(See argument, *post* pp. 69–72.)

## VI.

NO ESTOPPEL ARISES FROM THE RECITALS CONTAINED IN THE CAPTION TO THE REGISTRATION OF THE BONDS IN THE SUPERVISOR'S BOOK.

1. The statute authorizing registration by the supervisor did not require or authorize him to make any statement in such caption bearing upon the matters respecting which an estoppel is claimed. (*Post* p. 72.)

Rev. Stat. Ill. Chap. 113, ¶ 12.

2. The entry in the supervisor's book appears from the evidence not to have been made or signed by the supervisor, nor by any one authorized to make the same for that officer. (Print. Rec. 143.)

## VII.

THE TOWN IS NOT ESTOPPED BY THE RECOVERY IN THE FORMER SUIT BROUGHT BY WALLACE UPON OTHER COUPONS, FROM MAKING THE DEFENSE SET UP IN THE SPECIAL PLEAS IN THIS SUIT.

The Wallace suit was brought upon other coupons than those involved in this suit.

The defenses interposed by the special pleas were not set

up and actually litigated in the Wallace suit. Such being the case, the verdict and judgment in that suit do not estop the town from making either of the defenses set up in the special pleas in this suit.

*Cromwell* v. *County of Sac*, 94 U. S. 351.
*Davis* v. *Brown*, *Ibid.* 423.
*Russell* v. *Place*, *Ibid.* 608.
*Nat. Bank* v. *Ind. School Dist.* 25 Fed. Rep. 629.
*Nesbit* v. *Ind. School Dist.* Ib. 635.

1. The statutory defense set up in the second plea could not have been proven as against a *bona fide* holder for value under the general issue, which was the only plea filed in the Wallace suit.

*Anderson* v. *Jackson*, 66 Ill. 523.
*Cole* v. *Joliet Opera House Co.*, 79 Ill. 96.
*Sims* v. *Klein*, Breese Rep. 302.

While it was competent at common law, and independently of the statute, to prove fraud in the inception of the paper under that plea, it was a sufficient answer to such proof, introduced under the general issue at common law, to show that the plaintiff was a *bona fide* holder for value.

*Smith* v. *County of Sac*, 11 Wall. 139.

Under the pleadings in that case, it was unnecessary that the jury should pass upon the question of fraud in order to find a verdict for the plaintiff, who appeared to be a *bona fide* holder. Under the Illinois statute when the defense that the making and executing of the paper was obtained by fraud, etc., is specially pleaded, the defense is good against a *bona fide* holder.

*Hubbard* v. *Rankin*, 71 Ill. 129, and other cases cited *ante* p. 22.

2. It is not competent to show by extrinsic evidence that matters were adjudicated in such former suit, *not* embraced within the issues as formed on the record.

*Packet Co.* v. *Sickles*, 5 Wall. 592.
*Putnam* v. *New Albany*, 4 Bissell, 366, 383.
*Providence* v. *Adams*, 11 R. I. Rep. 190.

The rule is well expressed in Herman on Estoppel, § 91 thus:

"But while parol evidence may sometimes be admitted for the *purpose of limiting the estoppel*, it is never allowed to *enlarge its operation*, or to show that matters foreign to the record were embraced in the verdict."

The extrinsic evidence must be consistent with the record.

*Russell* v. *Place*, 94 U. S. 609.

3. *As to the Third Plea:* The evidence shows that the defense set up in this plea, arising under § 12 Art. IX of the constitution, was not in any manner litigated in the Wallace suit. No evidence was introduced in that case tending to show either the amount of the existing indebtedness of the town or the assessed value of the taxable property therein.

The defense appears to have rested on other grounds.

*Davis* v. *Brown*, 94 U. S. 423, 428.
Freeman on Judgments, § 274.
*Barger* v. *Hobbs*, 67 Ill. 598.
*Sturtevant* v. *Randall*, 53 Me. 149.
*Cromwell* v. *County of Sac*, 94 U. S. 351.
*Russell* v. *Place*, Ibid. 608.

4. The same observations and authorities apply to the defense set up in the fourth plea.

## ARGUMENT FOR PLAINTIFF IN ERROR.

Each of the three special pleas presents a distinct and different defense. It will conduce to perspicuity to consider the questions peculiar to each plea separately.

### I.

AS TO THE DEFENSE MADE BY THE AMENDED SECOND PLEA.

This plea is framed under section 11 of chapter 73 of the Revised Statutes of Illinois, entitled "Negotiable Instruments," in force when these bonds were issued, in these words:

"If any fraud or circumvention be used in obtaining the making or executing of any of the instruments aforesaid, such fraud or circumvention may be pleaded in bar to any action to be brought on any such instrument so obtained, whether such action be brought by the party committing such fraud or circumvention, or any assignee or assignees of such instrument."

Gross' Stat. of Ill. (Ed. of 1869) p. 462, § 11.

The same section is continued in force and embodied in the Revised Statutes of 1874, and forms section 10 of chapter 98, entitled "Negotiable Instruments," in the current editions of the State statutes.

Under this statute the defense that the *making* or *executing* of the instrument was obtained by fraud and circumvention is good against a *bona fide* holder for value, to whom the same has been transferred before maturity, without notice of the alleged fraud.

*Hubbard* v. *Rankin*, 71 Ill. 129.
*Taylor* v. *Atchison*, 54 Ill. 196.
*Van Brunt* v. *Singley*, 85 Ill. 281.
*Richardson* v. *Schirtz*, 59 Ill. 313.
*Easter* v. *Minard*, 26 Ill. 495.

The settled rule in Illinois, where this statute exists, is that the defense thereby authorized can not be made under the general issue against a *bona fide* assignee, but, in the language of the statute, " may be pleaded," etc.

*Anderson* v. *Jackson*, 66 Ill. 526.
*Cole* v. *Joliet Opera House Co.*, 79 Ill. 96.
*Sims* v. *Klein*, Breese Rep. 302.

To meet this requirement of the statute the amended second plea was filed. By a specific averment of facts the plea shows that the railroad company had not complied with the terms of the vote authorizing the donation to be made and consequently was not entitled to the bonds and could not lawfully obtain them. That knowing this the railroad corporation, by its president, directors and attorney, on the night of April 3, 1871, conspired together to procure, and did procure their attorney, Cartwright, who was one of the justices of the peace of the town, in conjunction with Marsh, the town clerk, to make a pretended and colorable appointment of one of their directors, E. S. Potter, to the office of supervisor of the town, in order that he might sign the bonds in question on that night, and before a supervisor of the town could be elected at the annual town meeting, to be held the next day. That in order to give their director, Potter, apparent authority to act as supervisor for the town, they made false and fictitious entries upon the town records, viz., the order of appointment, official bond and official oath of Potter as such supervisor, and the jurat to such official oath, signed by said Cartwright as justice of the peace, were each dated back to December 31, 1870; and Potter made false entries of his name upon the town records to show that he had been present at a meeting of the board of town auditors, and had acted as supervisor at the meeting of that board held March 28, 1871, before his pretended appointment was made; that Potter's official bond, thus antedated, was signed, as sureties, by two of the officers of the railroad, thus conspiring with him to secure his signature to the bonds as supervisor of the town; that all

this was done as part of the conspiracy entered into by the said railroad company, through its said officers, to give its director, Potter, apparent authority to execute the bonds in behalf of the town; and that at the same time, and as part of the same transaction, said Potter, as such pretended supervisor, with Marsh, as town clerk, proceeded to sign the bonds and coupons secretly and in the night time; and that the fact of such execution of the bonds was concealed from the voters of the town at the town meeting held the next day, and for several weeks thereafter. It is also shown by the plea that at the time of such appointment William Schultz was one of the justices of the peace of the town, residing therein, and that he was not notified of, and did not participate in such appointment, for the reason that it was known he would not join in such fraudulent conspiracy; and that therefore Potter's appointment was invalid, and conferred upon him no authority to act as supervisor, independently of the question of fraud.

The plea shows that the railroad company, through its attorney, president and directors, entered into this fraudulent scheme to confer such color of authority on their director, Potter, in order to procure such execution of the bonds; and that the pretended appointment of Potter as supervisor and the execution of the bonds were all part of, and done to carry into effect, one connected fraudulent conspiracy to obtain the execution of the bonds; and the plea shows that by means thereof the execution of bonds was in fact obtained.

The plea shows that the same acts which gave Potter color of title to the office, were in fact fraudulent acts—the making of false entries upon the records of the town indicating that he had acted as supervisor at a time when he had no pretense of title to the office—the making of a false and fraudulent record of the town in relation to his appointment and qualification as supervisor, done at the same time, and as part and parcel of the same transaction, and as a means to the accomplishment of the same end,

viz., the signing and executing of the bonds and coupons in question. It is true, no fraud was practiced upon Potter, to procure him to attach his name to the bonds. He knowingly and intentionally signed his name to each of them. But they were not executed as Potter's bonds or obligations. They were signed and executed by him as the bonds of the town of Oregon. The fraud was practiced on the town. The execution of the bonds *by the town* was obtained by fraud and circumvention. This meets the full requirements of the statute, to enable the town to make this statutory defense.

1. We agree with the counsel for defendant in error that the "fraud or circumvention" referred to in this statute must, in the language of the statute, "be used in obtaining "*the making* or *executing* of any of the instruments afore-"said." In other words, the fraud must relate to obtaining the execution of the instruments. We also agree with counsel that fraud in the consideration or contract in which the note or other negotiable instrument had its origin, however gross, is not such fraud in obtaining the execution of the paper as constitutes a defense against a *bona fide* holder under this statute.

Many Illinois cases may be cited wherein it has been held that the fraud must relate to obtaining the execution of the instrument in order to make a defense under the statute, and wherein the court discuss the peculiar device resorted to in each case before it, to procure such execution; and from those authorities counsel seeks to deduce the conclusion that unless the fraudulent device shown by the second plea is the same as the particular device held sufficient in the cases cited, the plea must be bad.

We insist the conclusion does not follow from the premises. While the Illinois courts persistently hold that the fraud must relate to the obtaining of the execution of the instruments, and that fraud in the consideration is not sufficient, the Supreme Court of Illinois has never assumed to define, in advance, all the various fraudulent devices which may be practiced to obtain the execution of such paper.

The court has merely determined each case as it arose, according to the special circumstances appearing therein. And the fact that the fraudulent device shown by the second plea is not exactly like any of those occurring in the reported cases, is no argument against the sufficiency of the plea. It is impossible to determine in advance what devices or forms of fraud and circumvention satanic ingenuity may not invent to obtain the execution of such instruments.

The statute is: "If *any* fraud or circumvention be used "in *obtaining the making or executing* of any of the instru- "ments aforesaid," the same may be pleaded as a defense, even against a *bona fide* holder.

2. Aside from the question of fraud, Potter's appointment as supervisor was invalid. The statute then in force provided that, in case of a vacancy in any town office, "it shall "be lawful for the *justices* of the peace of the town, together "with the supervisor and town clerk, to fill the vacancy by "appointment under their hands and seals."

> Gross' Stat. of Ill. (Ed. of 1869), p. 750, Art. VII, Sec. 1.

It appears from the plea that William Schultz was elected to the office of justice of the peace April 5th, and duly qualified April 9, 1870, and that although he had tendered his resignation March 2, 1871, no successor had been elected in his place, and he was still living and a justice of the peace of the town, residing therein, at the time of the pretended appointment of Potter as supervisor, on the 3d day of April, 1871. These facts are admitted.

Under the constitution and laws of Illinois, a justice of the peace continues in office until his successor is elected and qualified, notwithstanding an attempted resignation.

> *People* v. *Barnett*, 101 Ill. 332.
> *Badger* v. *U. S. ex rel. Bolles*, 93 U. S. 599.
> Illinois Const. of 1848, Art. IV, § 27.
> Illinois Const. of 1870, Art. VI, § 32.

The policy of the law is that the public interests require that the office shall not become actually vacant. Nothing

but death, or possibly removal of the incumbent, can accomplish this result.

The official life of the former incumbent continues until his successor is elected and qualified. (*Ibid.*)

Such being the case, Schultz must be regarded as a justice of the peace of the town, on April 3, 1871.

It is conceded that he was not present and was not consulted, and took no part in the appointment of Potter as supervisor; nor was he notified or requested to be present. He was one of the officers upon whom the power of appointment was conferred by the statute.

"The law is well settled that where a statute constitutes a board of commissioners or other officers to decide any matter or perform an official act, but makes no provision that a majority of such officers shall constitute a quorum, *all must be present to hear and consult*, or at least be notified of the meeting, though a majority may then decide."

*Crocker* v. *Crane*, 21 Wend. 211, 218.
*Babcock* v. *Lamb and Doty*, 1 Cowen 238.
*Ex parte Rogers*, 7 Cowen, 526 and note, p. 533.
*Louk* v. *Woods*, 15 Ill. 262.

An appointment by the town clerk and one of the justices of the peace of the town, without the presence or participation of the other, or notice to him, would be invalid, irrespective of the charges of fraud contained in the plea. "The "public can only act through its authorized agents, and it is "not bound until all who are to participate in what is to be "done have performed their respective duties."

*Anthony* v. *County of Jasper*, 101 U. S. 698.

Potter's appointment was therefore invalid, and he never acquired the legal right to act as supervisor of the town. He was not a supervisor *de jure*. The utmost that can be claimed is that he thereby became supervisor *de facto*.

3. Authorities may be cited at great length in support of the familiar and conceded doctrine, that so far as concerns the public and third persons, dealing in good faith with an

officer *de facto*, his acts will be held valid, though he may not be vested with a legal title to the office, and may in fact have no right to exercise its functions.

This rule, as the authorities in support of it show, is based upon considerations of public policy and convenience.

It would be manifestly inconvenient for third persons who had business to transact with public officers, publicly acting as such under color of authority, to be compelled to investigate the title of the incumbent to the office he was exercising, before they could safely proceed to the transaction of their business.

The reasons of public policy which led to the adoption of this rule have no application to parties who fraudulently conspire together to make a colorable appointment of one of their own number, in order that they may procure him to perform the alleged official act for their benefit, under the fraudulent color of title they have conferred upon him for that purpose.

The rule which protects the rights of third persons dealing with a *de facto* officer, presupposes that such third persons act in good faith. Thus it is said: "An election is "not void when it is held by persons who are not officers *de* "*jure*, but are officers *de facto*, and *act in good faith* under "color of authority."

*Lippincott* v. *Town of Pana*, 92 Ill. 31.
*Rhodes* v. *McDonald*, 24 Miss. 418.

All the authorities agree that the acts of a mere *de facto* officer are invalid, so far as concerns his own rights, because he is presumed to have notice of his defective title to the office.

*People* v. *Weber*, 86 Ill. 283.

And this is the rule, notwithstanding the *de facto* officer may have acted in good faith, without actual knowledge of any defect in his title to the office. (*Ib.*)

For stronger reasons is such act void, where those in whose favor it is done fraudulently conspired together to give a color of appointment to one of their own number, in

order that he might perform the official act required to consummate their fraudulent design, as part and parcel of the same transaction by which they gave him his color of appointment to the office. This is the case disclosed by the second plea, and the evidence in support of it.

If the bonds were void as to the railroad company, because their execution was obtained by fraud or circumvention, then, under the statute, the same are void in the hands of the plaintiff, although an innocent holder.

"When a statute, expressly, or by necessary implication, declares the instrument void, it gathers no validity by its circulation in respect to the parties executing it."

1 Dan. Neg. Insts., pp. 170, 659, §§ 197, 807.
*Bayley* v. *Taber*, 5 Mass. 286.
*Vallet* v. *Parker*, 6 Wend 615.
*Town of Eagle* v. *Kohn*, 84 Ill. 292.
*Hatch* v. *Burroughs*, 1 Woods, 439.

The evidence, we insist, fully sustained the averments of fact contained in this plea. (See Stipulation, *ante* pp. 7, 8, and the testimony of the witnesses, F. H. Marsh, William J. Mix, George M. Dwight and E. F. Dutcher, contained in the printed record at pages 145 to 158.)

At all events, the evidence so strongly tended to prove the charge of fraud and all the material facts set up in this plea, that the defendant had the right to have the issue of fact raised thereon submitted to the jury.

## II.

### AS TO THE QUESTIONS ARISING UNDER THE THIRD PLEA.

This plea was based upon section 12, article IX, of the constitution of Illinois, of 1870, which contains the following provisions:

"No county, city, township, school district, or other municipal corporation, shall be allowed to become indebted in any manner or for any purpose, to an amount including existing indebtedness, in the aggregate exceeding five *per centum* on the value of the taxable property therein, to be ascertained by the last assessment for State and county

taxes, previous to the incurring of such indebtedness. * * * * * * * This section shall not be construed to prevent any county, city, township, school district or other municipal corporation from issuing their bonds *in compliance with any vote of the people* which may have been had prior to the adoption of this constitution in pursuance of any law providing therefor."

The defense made under this section challenges *the existence of power* to issue the bonds, at the time they were executed.

The first period of this section contains an absolute prohibition against the creation of any indebtedness exceeding five per centum on the assessed valuation of the taxable property, etc., in any manner or for any purpose; and the saving clause at the end of the section only takes out of that general prohibition the power to issue bonds "*in compliance* with any vote of the people," etc.

The plain meaning of the entire section is, that all power to create such indebtedness, exceeding the five *per centum* mentioned, is absolutely taken away, except only that power shall remain to issue bonds *in compliance* with any vote previously had at an election held in pursuance of law, etc.

The plea shows by a proper averment of facts, that at the time of issuing the bonds in question, this section of the constitution was in force, and that the town of Oregon was then indebted in an amount exceeding $10,000; that the value of the taxable property within the town, as ascertained by the last assessment for State and county taxes, previous to the issuing of said bonds, was less than $200,000, and that the then existing indebtedness of the town exceeded five *per centum* thereon; and the truth of these averments is admitted by the stipulation of the parties. (*Ante*, p. 10.)

1. The adoption of the State constitution containing this section, deprived the town of all power to create any further indebtedness in excess of the constitutional limit, except so far as such power was reserved by the last paragraph of the section.

*Buchanan* v. *Litchfield*, 102 U. S. 278.
*School District* v. *Stone*, 106 U. S. 183.

*Litchfield* v. *Ballou*, 114 U. S. 190.
*Prince* v. *City of Quincy*, 105 Ill. 138, 215.

The proposition adopted by the vote of the people of the town is stated *ante* p. 8. By its express terms, "Said bonds were *not* to be issued, dated or delivered until," the conditions as to the building of the road were complied with, and it was expressly declared that "said vote and donation of forty thousand dollars to be *null and void* unless said first division of said railroad shall be completed and equipped as aforesaid on or before the first day of January, A. D. 1871, but in case the same shall be completed and equipped within the time aforesaid, and said company shall execute and deliver said release, then the said bonds to be delivered upon the demand of said company, and to bear date the day of delivery." (Exhibits, Printed Rec. pp 83, 106–109.)

It appears from the evidence that the railroad company wholly failed to comply with the terms of the vote, and complete and equip the first division of the road on or before the first day of January, 1871. It then became and was impossible to issue the bonds in compliance with that vote, which in terms declared that the bonds should *not* be issued. Upon the facts as they then existed, all power to issue the bonds had ceased. It was not within the competency of the town in its corporate capacity, nor of its officers, to re-create the power to issue the bonds, and thereby incur an indebtedness exceeding five per cent. on the assessed value of its taxable property. Any such exercise of power was then prohibited by the constitution. *The compliance with the vote mentioned in the constitution went to the very existence of the power, and not to the manner of exercise of a power having an independent existence.* Under the constitution no bonds could be then issued except in compliance with the vote of the people previously had. Under the then unalterable facts, the vote of the people had not been, and could not be, complied with; and instead of authorizing, the vote of the people, actually taken, then forbade the issuing of the bonds. It results, therefore, no power to issue the bonds and make them obligatory upon the town existed on the

third day of April, 1871, when the bonds in question were signed by Potter as supervisor.

It has been uniformly held that the absence, or want of legal power or authority of law, to issue such bonds and create municipal indebtedness, may be shown as a defence against a *bona fide* holder for value. Thus: "If the power "exists in the municipality the *bona fide* holder is protected "against mere irregularities in the manner of its execution; "but if there *is a want of power, no legal liability can be cre-* "*ated.*"

*Anthony* v. *Jasper County*, 101 U. S. 697.
*Northern Bank* v. *Porter Tp.*, 110 U. S. 618.
*Merchants' Bank* v. *Bergen Co.*, 115 U. S. 384.

Compliance with the vote was essential to the existence of power to create the indebtedness. Non-compliance with such vote, was something more than a mere irregularity in the execution of an existing power.

2. The question as to whether a municipality possesses legal power or authority to create certain specific indebtedness, does not always appear on the face of the law itself. It may depend upon extrinsic facts to be considered in connection with the law. Thus in the case of *Northern Bank* v. *Porter Township*, 110 U. S., *supra*, the existence of power to issue the bonds, depended upon the fact that the county commissioners had not been previously authorized by a popular vote, or an unreasonable delay in taking one, to make a subscription on behalf of the county.

In the case of *Daviess County* v. *Dickinson*, 117 U. S. 657, the existence of power to issue the bonds depended upon the fact as to whether bonds to the entire amount authorized by the vote of the people of the county, $250,000, had been issued by the county officers before the bonds sued upon in that case were issued. The same question was, substantially, involved in *Merchants' Bank* v. *Bergen County*, *supra*.

And it is held that the absence of the facts upon which the power of the municipality to create the indebtedness rests, may be shown as a defense to a suit brought by a *bona fide* holder of the bonds. (*Ibid.*)

It is likewise held to be competent to prove against a *bona fide* holder, facts showing that the power to issue the bonds, which once existed, had been exhausted by previous issues. (*Ibid.*)

So here, the question as to whether the town of Oregon, after the adoption of the constitution of 1870, possessed the power to issue the bonds in question, depended upon the fact as to whether a vote of the people of the town, authorizing the same, had been taken in pursuance of law, prior to the adoption of the constitution, and whether such vote had been complied with, so that the bonds could be issued in compliance therewith.

The purchaser was bound to know, from the face of the constitution, that there was no power or authority to issue the bonds, unless it could be done in compliance with such vote. The bonds did not upon their face recite that the same were issued in compliance with such vote of the people, nor that any vote upon that question had been had prior to August 8, 1870, in pursuance of law. Whoever purchased the bonds without inquiring as to those facts, did so at his peril. The constitution made the existence of legal authority or power to issue the bonds and create the indebtedness, to depend upon the existence of those facts.

The purchaser of the bonds was bound to take notice, not only of the constitutional limitation upon municipal indebtedness, but of such facts as the authorized official assessment disclosed concerning the valuation of taxable property within the town for the year 1870.

*Buchanan* v. *Litchfield*, 102 U. S. 289.
*Dixon County* v. *Field*, 111 U. S. 95.

He was bound to know the terms of the vote, which appeared on the records of the town.

In *Daviess County* v. *Dickinson*, *supra*, the purchaser was held chargeable with notice of limitations as to the amount of bonds authorized to be issued, imposed, *not by the law*, but solely by the proposal of the commissioners and the vote of the people of the county.

The principles laid down by this court in *Merchants' Bank* v. *Bergen County, supra*, are equally applicable here: "This is not a case where there existed a general power to issue negotiable securities of the county, so that parties would be justified in taking them when properly executed in form by its officers. All persons taking securities of municipalities having only such special power *must see to it that the conditions prescribed for the exercise of the power existed.* As an essential preliminary to protection as a *bona fide* holder, authority to issue them must appear. If such authority did not exist, the doctrine of protection to a *bona fide* purchaser has no application. This is the rule even with commercial paper purporting to be issued under a delegated authority. The delegation must first be established before the doctrine can come in for consideration." (115 U. S. 391.)

3. The supervisor and town clerk had no power to waive compliance with the vote making the proposed donation. They could not waive or dispense with that which the constitution had made essential to the existence of the power to issue the bonds; nor could they make binding and valid that which the statute of the State declared "shall not be valid and binding." The judicial reports of the State and Federal courts show that prior to the adoption of the constitution in 1870, municipal subscriptions or donations had been frequently voted to aid in the building of railroads, to take effect upon compliance with certain conditions precedent on the part of the railroad corporation. The general law of the State then in force contained this provision:

"And any county, township, city or town, shall have the right, upon making any subscription or donation to any railroad company, to prescribe the conditions upon which such bonds, subscriptions or donations shall be made, and such *bonds, subscriptions or donations shall not be valid and binding until such conditions precedent shall have been complied with.*"

Rev. Stat. Ill., Chap. 113, ¶ 17.
*Town of Eagle* v. *Kohn*, 84 Ill. 292.

The fact that such conditional subscriptions and donations had been frequently voted in towns or other municipalities, which under the provisions of this statute were not valid and binding until such conditions precedent had been

"*complied with*," must have been well known to the framers of the constitution of 1870, and shows what was meant by the saving clause of section 12, article IX, reserving the right to issue such "bonds *in compliance with any vote* of the "people which may have been had prior to the adoption of "this constitution," etc.

The language of this saving clause in the constitution was used with reference to well known existing facts of a public nature, and the existing state of the law. When read in the light of those facts and the laws of the State then in force, the meaning of this saving clause, which only reserved to such municipal bodies the power to issue bonds in excess of the constitutional limit of five per cent., "*in compliance with any vote of the people*" previously had in pursuance of law, can not be doubtful. It simply reserved power to issue such bonds and create an indebtedness in excess of the prescribed five per cent., when, and only when, such conditions precedent had "been complied with," to use the language of the statute then in force. This clearly excludes the existence of any implied power to waive or dispense with the compliance with such conditions precedent.

Moreover, the supervisor and town clerk of a town, organized under the township organization law of Illinois, are not vested with authority to exercise the general corporate powers of such town, but are only authorized by law to perform certain prescribed official duties.

Under this law the general corporate powers of such towns are vested in the legal voters of each town, to be exereised when duly convened in town meeting.

Rev. Stat. of Ill., Chap. 139, Art. IV.

They have no body of corporate officers answering to a city council in cities, or county board in counties, to whom the exercise of these general corporate powers is intrusted. They are the nearest approach to a pure democracy we have in our system of government. The power to waive compliance with the conditions to their proposed donation, imposed by the vote of the people of the town, had not been delega-

ted to the supervisor and town clerk. If such power existed anywhere, it resided in the legal voters of the town, to be exercised in town meeting.

But, as we shall presently show by the decisions of the Supreme Court of Illinois, the power to waive compliance with such conditions was taken away by the adoption of the constitution of 1870, and thereafter had no existence, either in the town officers or in the body of the legal voters.

4. The case of *County of Randolph* v. *Post*, 93 U. S. 502, has been cited, and appears to be chiefly relied upon by the learned counsel for defendant in error in support of his contention that it was competent for the town to waive compliance with the vote authorizing the issue of the bonds.

An examination of that case will show that it has no bearing upon the question now raised, as to the effect of section 12, article IX, of the constitution, upon a case brought within its prohibition of power to incur or create municipal indebtedness in excess of five per cent. of the assessed value of the taxable property therein. So far as any constitutional question was involved, that case turned upon the proper construction of the separate section or article in relation to municipal subscriptions to railroads, etc., quoted in the opinion at page 508, as follows:

"No county, city, town, township or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to, or loan its credit in aid of such corporation; *Provided, however*, that the adoption of this article shall not be construed as *affecting* the right of any such municipality to make such subscriptions where the same have been authorized, under existing laws, by a vote of the people of such municipalities prior to such adoption."

Speaking of this separate section, the court in that case say:

"The provision does not apply where such subscriptions 'have been authorized under existing laws.' (*Ib.* 508.) Should we, however, assume the fact to be as is insisted by the plaintiff in error, it does not follow that its conclusion is correct. The constitutional provision alluded to prohibited all loans to corporations, of municipal credit, after July

2, 1870. If, however, a subscription for that purpose had already been authorized by a vote of the people, the right to make such subscription was not *affected* by the prohibition. If not authorized before the date mentioned, the subscription was absolutely prohibited. If previously authorized, the constitution had nothing to do with it. It was as if no such ordinance existed." (*Ibid.* 513.)

It is manifest that this ruling of the court is based upon the peculiar language of the proviso to the separate section. It might with propriety be held that if the right to issue the bonds was not *affected* by that provision, in any case where the same had been authorized under existing laws by a vote, etc., that the provision of the constitution in question had no bearing on the case, whenever it was made to appear that such vote had been taken prior to its adoption. The same reasoning can not be fairly applied to the saving clause of section 12, Art. IX. (*Ante* p. 42.)

The language of this section is not that it shall not *affect* any case where such vote had been so taken. This saving clause does *affect* the case notwithstanding a vote may have been had before the adoption of the constitution, to the extent of only permitting the issue of such bonds *in compliance* with that vote. Nothing is taken out of the general prohibition contained in the first period of section 12, except that which is embraced in the terms of the saving clause.

The saving clause is that the section shall not be "con- "strued to prevent any * * township * * from "issuing their bonds *in compliance* with any vote," etc., which clearly implies that it shall be construed to prevent the issue of such bonds *not* in compliance with any vote, etc. In other words it leaves the general prohibition in full force unless the bonds could be issued in compliance with such vote.

Under all circumstances and conditions, this section *affects* the case so far, at least, as to require, and only to permit, the bonds to be issued *in compliance* with a vote of the people. To hold that it does not have application to this

extent at least, would be to re-make the constitution for the people of the State of Illinois.

The case of *Randolph County* v. *Post, supra*, with the other cases cited by plaintiff's counsel, are distinguishable from the case at bar in other essential particulars: (1.) In that case the bond contained this recital: "This bond is one of a "series issued by the county of Randolph in payment of $100,- "000 of the capital stock *in pursuance of an election held* by the "legal voters of Randolph county, Illinois, on the sixth day of "June, 1870, and by virtue of the provisions of an act," etc. (93 U. S., 505), whereas the bonds sued upon in this case contain no recital to the effect that the same were issued *in pursuance* of any election held prior to the adoption of the constitution in 1870. It might well be claimed that a recital showing that bonds were issued *in pursuance* of a vote or election, was equivalent to a recital that the same were issued *in compliance* with such vote or election. (2.) The opinion shows that it did not appear in that case that the conditions of the vote were not, in fact, complied with. (*Ib.* 512.) (3.) Neither the amount of the existing indebtedness nor the assessed value of the taxable property of the county were made to appear in that case. The prohibition contained in section 12, article IX, would have no application to any case where the assessed value of the taxable property of the municipality did not appear.

5. The uniform current of decisions in the State of Illinois sustains the construction for which we contend. It was held by the Supreme Court of Illinois, at its September term in 1870, and prior to the issue of the bonds in question, in a case involving the vote of a township to subscribe to the stock of a railroad corporation, thus:

"We have no hesitation in saying that the electors might vote to subscribe on any conditions they see proper to annex, and that the company can only receive it on the terms prescribed by the vote," * * * * *

"In the case at bar the relator claimed the right to an unconditional subscription, and it is the purpose of this proceeding to compel the supervisor to make such subscription. We have seen that he is not authorized, under any circum-

stances, or at any time, to make a subscription upon any but the conditions it was voted."

*The People* v. *Dutcher*, 56 Ill. 149.

And this ruling has been constantly adhered to, and repeatedly affirmed.

*People* v. *Glann*, 70 Ill. 232.
*People* v. *Holden*, 91 Ill. 446.

Ever since the adoption of the constitution of 1870 it has been uniformly held by the Supreme Court of the State, that the new constitution deprived municipal corporations of all power to create such indebtedness, or issue such bonds, without compliance with the conditions prescribed in the vote authorizing the same.

Thus in *Middleport* v. *Ætna Life Ins. Co.*, 82 Ill. 562, the court say:

"It is apprehended the obligations assumed under existing laws can not, since the adoption of the constitution, be enlarged or materially changed, either by the action of the people of the township or its corporate authorities. All power is taken away, and the utmost that can be done is to make and complete the subscription or donation previously voted, under then existing laws, *upon the same terms and conditions as voted.* Subscriptions or donations upon other terms would obviously require new consent on the part of the people of the municipality, which can not be had for want of power."

This decision was re-affirmed by the Supreme Court of Illinois, in the subsequent case of *The People* v. *Jackson Co.*, 92 Ill. 451, where it is said:

"In the case of the *Town of Middleport* v. *Ætna Life Ins. Co.*, 82 Ill. 562, it was held, that since the adoption of the constitution it is plain any donation attempted to be made by a municipality in aid of a railroad or private corporation, is forbidden absolutely. That the obligations assumed then under existing laws can not, since the adoption of that instrument, be enlarged or materially changed, either by the action of the people of the municipality or its corporate authorities. All power is taken away, and the utmost that can be done is to make and complete the subscription or donation previously voted under then existing laws, *upon*

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*the same terms and conditions voted.* Subscriptions or donations on other terms would obviously require new consent on the part of the people of the municipality, which can not be had for want of power. That the burthen rests upon the party alleging the validity of the bonds issued since the adoption of the constitution, to show affirmatively that they were authorized by a vote of the people of the municipality, under existing laws, prior to the adoption of that instrument. * * * * * * * The prohibition is general and positive in all cases but those saved by the proviso; and it is a well recognized rule, that a person claiming a right saved by a proviso or exception in a statute, must show that the right claimed is clearly within the proviso or exception."

*The People* v. *Jackson Co.*, 92 Ill. 451.
Gould's Pleading, Chap. IV, § 22.

Again the Supreme Court of Illinois holds:

"The bonds in question having been issued after the present constitution went into effect, the burden of showing they were issued *in compliance with a vote of the people of the town*, had prior to the adoption of the present constitution, in pursuance of some law providing therefor, *rests upon those affirming their validity.*"

*Town of Prairie* v. *Lloyd*, 97 Ill. 191.
*Wade* v. *La Moille*, 112 Ill. 79.

## III.

AS TO THE QUESTIONS ARISING UNDER THE FOURTH PLEA.

The following separate section or article was adopted and took effect as a part of the constitution of Illinois, July 2, 1870, entitled "*Municipal Subscriptions to Railroads or Private Corporations:*"

"No county, city, town, township or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to, or loan its credit in aid of such corporation; *Provided, however,* that the adoption of this article shall not be construed as *affecting* the right of any such municipality to make such subscriptions where the same have been authorized, *under existing laws,* by a vote of the people of such municipalities prior to such adoption.

*Wade* v. *Walnut*, 105 U. S. 1.

The bonds in question were not issued until after July 2, 1870, the date of the adoption of this article of the constitution. Their issue was thereby prohibited, unless the same had been "*authorized under existing laws*," by a vote of the people of the town prior to July 2, 1870.

The fourth plea shows that the only vote taken upon the question was at a town meeting, held and presided over by a moderator, and not held by the judges of election, as required by law, and that no such election as the charter required was held prior to the adoption of the constitution in 1870, at which the bonds were authorized to be issued by a vote of the people. The matters of fact averred in this plea were fully proven by the stipulation of the parties; and "Exhibit K" thereto attached, in connection with the other evidence introduced on the trial. (Printed Rec., pp. 82, 109, 146.)

The charter of the Ogle and Carroll County Railroad Company, under which it is claimed the vote was taken, did not authorize such vote to be taken at a town meeting, but at an *election*, and it is expressly provided, "and such *election* "shall be held and conducted, *and return thereof made* as is "provided by law, and, in any village or city as is provided "by law under which the same is incorporated, and an addi- "tional return shall be made to one of the directors of said "company." (Print. Rec., p. 4.)

3 Pr. Laws Ill. 1869, p. 325, § 6.

1. A town meeting, presided over by a moderator, and not held by the judges of election, as required by the statute, is held not to be an election within the meaning of the term as used in the charter; and it is the settled rule in the Supreme Court of Illinois, that a vote taken at such town meeting, required to be taken at an election, is not a vote taken "under existing law" and is therefore void.

*C. & I. Ry. Co.* v. *Mallory*, 101 Ill. 583.
*Lippincott* v. *Pana*, 92 Ill. 24.

The statutes of Illinois, in force in 1870, as well as those in force at the present time, clearly distinguish between

proceedings at elections, and town meetings. Elections are required to be presided over by three judges of election. The statute in force in 1870 provided that "Each town, acting "under township organization, shall constitute an election "precinct, and the supervisor, assessor and collector shall be "*ex-officio* judges of election."

Gross' Stat. of Illinois (Ed. of 1869), p. 778, § 1.

Such judges of election are required by statute to canvass the votes cast at such election, and make and sign a certificate stating the result thereof, and deliver or *return* the same to the county clerk. (*Ibid.* pp. 247–8, Chap. 37, ¶¶ 28–34.)

On the other hand a moderator selected by the voters present, is required to preside at a town meeting, and to canvass the votes and declare the result; and the town clerk is required to keep a minute of the proceedings and file the same in his office as a part of the town records (*Ibid.* p. 747, Art. V, §§ 1 to 22.)

Thus: "§ 14. The minutes of the proceedings of every town meeting, subscribed by the clerk of said meeting, and by the presiding officer, shall be filed in the office of the town clerk within ten days after such town meeting." "§ 22. The canvass being completed a statement of the result shall be entered at length by the clerk of the meeting, in the minutes of its proceedings to be kept by him as before required, which shall be publicly read by him to the meeting. (*Ibid.* p. 748.)

No *return* of the proceedings at a town meeting is required to be made, but the judges of election are required to make "returns" to the county clerk of the elections held by them. (*Ibid.* p. 247, ¶ 31.)

The fact that the clause of the charter, quoted above, requires that "such election shall be held and conducted *and return thereof made* as is provided by law" shows that a regular election was required to be held, of a character requiring a "return thereof" to be made as was then provided by law. This points, unmistakably, to an election to be held by the judges of election who were required to make such election returns.

This construction is confirmed by the concluding words of the provision quoted above, which requires such election to be held and conducted "*in any village or city* as is pro- "vided by law under which the same is incorporated."

If it had been designed that towns organized under the township organization law should vote upon the question the same as at town meetings provided for in that law, why was it not so expressed, or a provision inserted similar to that in relation to villages and cities?

The plain intention was to throw around the proceeding all the safeguards provided in respect to regular elections, presided over by the three principal officers of the town, as *ex-officio* judges of election.

2. The recital contained in the bonds wholly fails to show that the same were issued in pursuance of an election held under the charter of the railroad company, prior to July 2, 1870, the date of the adoption of the constitution, or that any such election was held prior to that date. (*Ante* p. 2.)

The case is, therefore, unlike those in which it has been held the town is estopped from denying the validity of the election, by reason of recitals contained in the bonds.

*Pana* v. *Bowler*, 107 U. S. 529.

The reasoning of this court in *Pana* v. *Bowler*, *supra*, when applied to the facts of this case, shows that the fourth plea sets up a valid defense to the bonds and coupons now before the court.

It is there said:

"This defect was that the election was presided over and the returns made, not by the supervisor, assessor and collector of the township, *ex officio* judges of elections, but by a moderator chosen by the electors present.

"It is insisted by the plaintiff in error that as the constitution of Illinois, adopted July 2, 1870, by its second additional section, cut off the power of any township or other municipality to subscribe to the capital stock of, or make a donation to, any railroad company, except when such subscription or donation has been authorized under existing laws, by a vote of the people of the municipality prior to the adoption of the constitution, and as, by reason of the defect just mentioned, there was no legal election, it follows

that there was no authority in the officers of the township of Pana to make the donation or issue the bonds in question in this case, and that the bonds were not binding on the township. We can not assent to this conclusion."

* * * * * * * *

"The bonds in question in this case recite on their face that they were issued by the township, *in compliance with the vote of the legal voters thereof at an election held on April 30, 1870*, under and by virtue of the authority conferred by acts of the General Assembly of the State of Illinois, specifying the acts of February 26, 1867, and February 24, 1869, above mentioned.

"This court has again and again decided that if a municipal body has lawful right to issue bonds or other negotiable securities, dependent only upon the adoption of certain preliminary proceedings, such as a popular election of the constituent body, the holder in good faith has the right to assume that such preliminary proceedings have taken place *if the fact be certified on the face of the bonds by the authorities whose primary duty it is to ascertain it. Lynde* v. *The County*, 16 Wall. 6; *Town of Coloma* v. *Eaves*, 92 U. S. 484; *Commissioners* v. *January*, 94 *id.* 202; *Commissioners* v. *Bolles*, *id.*, 104; *County of Warren* v. *Marcy*, 97 *id.* 96.

"The authority to issue the bonds in question in this case, resting upon the fact that an election was held in pursuance of law before a certain date, namely, the date when the constitution of 1870 was adopted, and the bonds reciting on their face the fact that the election was so held before the date mentioned, the circumstance that the election was irregularly conducted can be of no avail as a defense to the bonds in a suit brought by a *bona fide* holder."

* * * * * * *

"Our attention has been called to the decision of the Supreme Court of Illinois, in the case heretofore mentioned and reported as *Lippincott* v. *Town of Pana*, 92 Ill. 24, in which it was held that the election relied on in this case as the authority for the issue of the bonds was absolutely void, and the issue of them was therefore without authority."

* * * * * * *

"It is insisted that this court is bound to follow this decision of the Supreme Court of Illinois, and hold the bonds in question void. We do not so understand our duty. Where the construction of a State constitution, or law, has become settled by the decisions of the State courts, the courts of the United States will, as a general rule, accept it as evi-

dence of what the local law is. Thus we may be required to yield against our own judgment to the proposition that, under the charter of the railway company, the election in this case, which was held under the supervision of a moderator, chosen by the electors present, was irregular and therefore void. But we are not bound to accept the inference drawn by the Supreme Court of Illinois, that in consequence of such irregularity in the election, the bonds issued in pursuance of it by the officers of the township, which recite on their face that the election was held in accordance with the statute, are void in the hands of *bona fide* holders. This latter proposition is one which falls among the general principles and doctrines of commercial jurisprudence, upon which it is our duty to form an independent judgment, and in respect of which we are under no obligation to follow implicitly the conclusions of any other court, however learned or able it may be."

*Pana* v. *Bowler*, 107 U. S. 539–541.

This court did not assume to overrule the Supreme Court of Illinois in the construction of the State statutes bearing on this question, but rested its judgment solely upon the question of estoppel arising upon the recitals contained in the bonds in that case. And since the bonds now before the court contain no such recitals as were there held sufficient to estop the town from making this defense, the reasoning of the court in that case sustains the sufficiency of the defense made under the fourth plea in this case.

## IV.

THE TOWN IS NOT ESTOPPED BY THE RECITALS CONTAINED IN THE BONDS FROM MAKING THE DEFENSES SET UP IN THE SPECIAL PLEAS.

The bonds contained a recital in these words:

"For which payment of principal and interest, well and truly to be made, the faith, credit and property of the said town of Oregon are hereby solemnly pledged, under authority of an act of the general assemby of the State of Illinois entitled 'An act to amend an act entitled an act to incorporate the Ogle and Carroll County Railroad Company,' which said act was approved March 30, 1869. This bond is

one of a series numbering from twenty-one to sixty, inclusive, for $1,000 each, which bonds so numbered, together with another series numbered from one to twenty, inclusive, for $500 each, are the *only* bonds issued by said town of Oregon, under and by virtue of said act." (Printed Rec., pp. 7, 79.)

1. In order to preclude the town from making the defense set up in the third plea, based upon Sec. 12, Art. IX, of the State Constitution of 1870 (*ante* p. 41), the recital must show that the bonds were issued *in compliance with a vote of the people of the town, had prior to the adoption of this constitution*, in pursuance of a law providing therefor.

In order to preclude the town from making the defense set up in the fourth plea, based upon the separate section of the constitution adopted July 2, 1870, (*ante* p. 52), the recital must show that the donation or subscription had "been authorized *under existing laws by a vote of the people" of the town, prior to July 2, 1870,* the date of such adoption. Upon these vital matters the recital is silent.

Assuming for the purpose of the argument, that the recital is sufficient to show that the bonds were issued in accordance with the provisions of the act therein mentioned, this would fall far short of showing that the same were *issued in compliance with a vote of the people of the town at an election held in pursuance of that act prior to the adoption of the constitution in 1870.* The act required an election to be held before the bonds were issued, but did not require the same to be held before the adoption of the constitution in 1870. This requirement was imposed by the constitution itself. The recital does not purport to show compliance with the vote of the people, nor with the constitutional requirement in any respect, and can not be so enlarged by construction as to embrace the same.

*Buchanan* v. *Litchfield*, 102 U. S. 292.
*School District* v. *Stone*, 106 U. S. 183.
*Northern Bank* v. *Porter Tp.*, 110 U. S. 608.
*Dixon County* v. *Field*, 111 U. S. 83.
*Bates* v. *School Dist.*, 25 Fed. Rep. 192.
*Liebman* v. *San Francisco*, 24 Fed. Rep. 711.

In the case of *Buchanan* v. *Litchfield, supra*, the bonds of the city of Litchfield sued upon contained the following recital:

"This bond is issued under authority of an act of the general assembly of the State of Illinois, entitled 'an act authorizing cities, incorporated towns, and villages, to construct and maintain water-works,' approved April 15, 1873, and in pursuance of an ordinance of the said city of Litchfield numbered 184. and entitled 'an ordinance to provide for the issue of bonds for the construction of the Litchfield water-works,' approved December 3, 1873."

The defense rested upon the fact that the amount of indebtedness sought to be created by the bonds, including existing indebtedness, exceeded five per cent. of the assessed value of the taxable property in the city, and that the creation of such indebtedness was prohibited by section 12, article IX, of the Constitution of Illinois. It was urged in behalf of the plaintiff that the city was estopped from setting up this defense by reason of the recitals contained in the bonds.

After a review of the leading authorities bearing upon the question of estoppel by reason of recitals contained in municipal bonds, this Court say:

"Returning to the case in hand, it will be observed that the bonds issued by the city of Litchfield contain no recital whatever of the circumstances, which, under the constitution of the State, must have existed before the city could legally incur the indebtedness for which the bonds were issued. They purport, it is true, to be issued under the authority of the act of April 15, 1873, and in pursuance of the ordinance of the city, based upon that statute. But that statute does not expressly restrict the exercise of the power to erect and maintain a system of water-works to cases in which the aggregate indebtedness of the city was within the limit which the constitution declared no municipal corporation should exceed. Nor does the city ordinance recite or state, even in general terms, that the proposed indebtedness was incurred in pursuance of, or in accordance with the constitution of the State, or under the circumstances which permitted the issue of the bonds. Consequently, a recital that the bonds were issued under the authority of the statute,

and in pursuance of the city ordinance, did not necessarily import a compliance with the constitution."

* * * * * *

"Any different conclusion from that indicated would extend the doctrines of this court upon the subject of municipal bonds farther than would be consistent with reason and sound policy, and farther than we are now willing to go. The present action can not be maintained, unless we should hold that the *mere fact* that the bonds *were* issued without any recitals of the circumstances bringing them within the limit fixed by the constitution, was, in itself, conclusive proof, in favor of a *bona fide* holder, that the circumstances existed which authorized them to be issued. We can not so hold." (102 U. S. 292.)

So here, a recital that the bonds in question were issued "under and by virtue of said act" of March 30, 1869, to incorporate the Ogle and Carroll County Railroad Company, can not be construed to be a recital that the same were issued in conformity with requirements of the constitution of 1870, imposing limitations on the creation of municipal indebtedness; nor can it be construed into a recital that the bonds were issued in compliance with a vote of the people of the town had at an election held in pursuance of said act prior to the adoption of that constitution; because the act of March 30, 1869, referred to, is silent upon those questions.

In the case of *School District* v. *Stone*, 106 U. S. 183, the bonds recited that:

"This bond is issued by the board of school directors, by authority of an election of the voters of said school district, held on the thirty-first day of July, 1869, in conformity with the provisions of chapter 98 of acts, 12th General Assembly of the State of Iowa."

It appears that the statute of Iowa referred to in this recital, as well as the constitution of that State, each contain a similar limitation upon the amount of the indebtedness such a corporation may incur, as that prescribed in section 12, article IX, of the Constitution of Illinois. It was held that the recitals did not "necessarily import a compliance "with the statute or the fundamental law of the State on "that subject."

The court say:

"They necessarily imply nothing more than that the bonds were issued by authority of the electors, and that the election was held in conformity with the statute. The statute may have been pursued as to the notice required to be given of the time and place of the election, and as to the manner in which the will of the voters was to be ascertained; and yet it may have been disregarded in respect of the limit it imposed upon district indebtedness. The declaration, therefore, that the election was held in conformity with the statute does not, with sufficient distinctness, imply that the indebtedness voted was less than five per cent. on the value of the taxable property of the district, as shown by the State and county tax lists.

"This construction of the words employed in the bonds is characterized by counsel for the defendant in error as too narrow and technical.

"It may be a strict construction, and such, it seems to the court, ought to be the rule when it is proposed, by mere recitals upon the part of the officers of a municipal corporation, to exclude inquiry as to whether bonds, issued in its name, were made in violation of the constitution and of the statute, of the provisions of which all must take notice. Numerous cases have been determined in this court, in which we have said that where a statute confers power upon a municipal corporation, upon the performance of certain precedent conditions, to execute bonds in aid of the construction of a railroad, or for other like purposes, and imposes upon certain officers—invested with authority to determine whether such conditions have been performed—the responsibility of issuing them when such conditions have been complied with, recitals, by such officers, that the bonds have been issued 'in pursuance of,' or 'in conformity with,' or 'by virtue of,' or 'by authority of,' the statute, have been held in favor of *bona fide* purchasers for value, to import full compliance with the statute, and to preclude inquiry as to whether the precedent conditions had been performed before the bonds were issued.

"But in all cases, as a careful examination will show, the recitals fairly imported a compliance in all substantial respects with the statute giving authority to issue the bonds. We are unwilling to enlarge or extend the rule, now established by numerous decisions.

"Sound public policy forbids it. Where the holder relies for protection upon mere recitals, they should, at least,

be clear and unambiguous, in order to estop a municipal corporation, in whose name such bonds have been made, from showing that they were issued in violation or without authority of law." (*Ib.* 186.)

The recitals contained in the Oregon bonds do not show that an election was held in the town in pursuance of law providing therefor, authorizing the issue of the bonds, prior to the adoption of the constitution in 1870; neither do they show that the bonds were issued *in compliance with a vote of the people* of said town at such election so held, as required by the constitution. The town is not therefore estopped from showing that the same were issued in violation of the constitution.

2. The foregoing proceeds upon the hypothesis that it may have been competent for the supervisor and town clerk to make recitals in the bonds issued by them which would estop the town from interposing the defense, arising under the constitution of 1870. But we insist that these officers could not by recitals contained in the bonds, preclude the town from showing that they had no power, under the constitution, to issue the bonds.

While cases may, perhaps, be found containing general expressions giving countenance to the opposite view, the same do not appear to be regarded, in the recent decisions of this Court, as accurately stating the law. In the recent case of *Northern Bank* v. *Porter Township*, 110 U. S., in the opinion at page 614, it is said:

"It is, however, contended that by the settled doctrines of this court, the township is estopped by the recitals of the bonds in suit, to make its present defense. The bonds, upon their face, purport to have been issued 'in pursuance of the provisions of the several acts of the General Assembly of the State of Ohio, and of a vote of the qualified voters in said township of Porter, taken in pursuance of the provisions of the several acts of the General Assembly of the State of Ohio, and of a vote of the qualified voters in said township of Porter, taken in pursuance thereof.' These recitals, counsel argue, import a compliance in all respects with the law, and therefore the township will not be allowed, against a *bona fide* holder for value, to say that the circumstances did

not exist which authorized it to issue the bonds. *It is not to be denied that there are general expressions in some former opinions which, apart from their special facts,* would seem to afford support to this proposition in the general terms in which it is presented. But this court said in *Cohens* v. *Virginia*, 6 Wheat. 264, and again in *Carroll* v. *Lessee of Carroll*, 16 How. 275, 287, that it was a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision."

And after a review of the leading authorities upon the question, at pages 616 and 617, the following is laid down as the established rule of this Court:

"The adjudged cases, examined in the light of their special circumstances, show that the facts which a municipal corporation, issuing bonds in aid of the construction of a railroad, was not permitted, against a *bona fide* holder, to question, in face of a recital in the bonds of their existence, *were those connected with or growing out of the discharge of the ordinary duties of such of its officers* as were invested with authority to execute them, and which the statute conferring the power made it their duty to ascertain and determine before the bonds were issued; *not merely for themselves, as the ground of their own action, in issuing the bonds,* but equally as authentic and final evidence of their existence, for the information and action of all others dealing with them in reference to it."

In a still later case the same principle is re-affirmed:

"If the officers authorized to issue bonds, upon a condition, are not the appointed tribunal to decide the fact which constitutes the condition, their recital will not be accepted as a substitute for proof. In other words, where the validity of the bonds depends upon an estoppel, claimed to arise upon the recitals of the instrument, the question being as to the existence of power to issue them, it is necessary to establish that the officers executing the bonds had lawful authority to make the recitals, *and to make them conclusive.* The very ground of the estoppel is that the recitals are the official statements of those to whom the law refers the public for authentic and final information on the subject."

*Dixon County* v. *Field*, 111 U. S. 94.

Applying this principle to the case at bar, and the laws of Illinois applicable thereto, what is the result?

It appears that the vote was not taken at an *election* presided over by the judges of election, but that the same was taken at a special town meeting presided over by a moderator chosen from the voters present. (See Exhibit "K," *ante* p. 8 and Printed Rec. pp. 109, 146.) If it is held that the vote was thus lawfully taken at a special town meeting presided over by a moderator, then, it must also be held that such moderator was the officer authorized and required by the statute to canvass the votes and declare the result of such vote. (Gross' Stat. of Ill. (Ed. of 1869,) p. 748, §§ 20, 21.)

The statute also provided thus:

"§ 14. The minutes of the proceedings of every town meeting, subscribed by the clerk of the said meeting, and by the presiding officer, shall be filed in the office of the town clerk within two days after such meeting." * * * "§ 22. The canvass being completed, a statement of the result shall be entered at length by the clerk of the meeting in the minutes of its proceedings, to be kept by him as before required." (*Ibid.*, p. 748, Art. V, §§ 14–22.)

The supervisor in office when the special town meeting was held, was not authorized to perform any official act in connection with the same. And for stronger reasons the supervisor in office April 3, 1871 (when it is conceded the bonds in question were signed), was not authorized by law to declare the result of a town meeting or election held prior to July 2, 1870. The law imposed that duty and conferred that authority upon the officers who held and presided at such town meeting or election, and it made their returns or minutes, duly subscribed by them, and lodged in the proper office, legal evidence of the vote taken at such town meeting. Upon the conceded facts, E. S. Potter had no color of title to the office of supervisor until the night of April 3, 1871. He then had no power either to add anything to, or take anything from, the record evidence of the town meeting made by other officers in pursuance of law, more than nine months before he pretended to act as supervisor. His recital of facts connected with that election is

not the official statement of the officer to whom the law refers the public for authentic and final information on the subject. His recital in respect to the regularity of such election can not, therefore, estop the town from showing by the proper records, what the vote of the people of the town actually was, and that they voted *not* to issue the bonds or make the donation, in case the first division of the road was not completed by the first day of January, 1871.

Again: It was no part of the official duty of the supervisor or town clerk, to ascertain and certify as to whether the railroad company had complied with the conditions of the vote, nor to certify as to the time when the first division of said railroad was completed. They might, it is true, ascertain that fact for themselves, so far as to govern their own action, but their decision would conclude no one else.

*Northern Bank* v. *Porter Township*, 110 U. S. 616.
*Dixon County* v. *Field*, 111 U. S. 94.

It follows, therefore, that it was not within the power of these officers to make any statement or recital in the bonds covering these points, which would estop the town from showing the truth in the defense of this action.

If it is held that the vote was only authorized to be taken at an election, as distinguished from a town meeting, the result would be the same.

The officers empowered by law to ascertain and certify the result of such an *election* held in the town of Oregon prior to July 2, 1870, the date of the adoption of the State constitution, were the supervisor, assessor and collector of the town, then in office, who were *ex officio* judges of such election, and required by law to canvass the votes, and make, sign and return to the county clerk a written certificate of the result of such election "as provided by law." (Gross Stat. of Ill., [Ed. of 1869,] p. 778, § 1; also *Ibid.*, p. 247, ¶¶ 28–32.)

The sixth section of the amended charter of the Ogle and Carroll County Railroad Company also provided that "an "*additional return* shall be made to one of the directors of "said company." (*Ante*, p. —, Printed Rec. 4.)

The official returns thus made and certified, constitute the legal evidence of the election. The judges of the election were the only officers authorized by law to certify thereto, and their certificate was required to be attested by the clerks of the election. (Gross Stat. of Ill., [Ed. of 1869,] p. 247, ¶ 28.)

The supervisor of the town, who did not come into office until the next year after the election was held, was not the officer authorized to hold the election, canvass the votes, declare the result and make the record thereof. Upon the authorities before cited, any certificate he might then make would not be the primary evidence of the result or validity of such election. The town would not, therefore, be estopped upon these matters by any recital he might see fit to make in the bonds then issued by him.

## V.

### THE TOWN IS NOT ESTOPPED BY THE CERTIFICATES CONNECTED WITH THE REGISTRATION OF THE BONDS FROM SHOWING THE TRUTH IN ITS DEFENSE.

It is contended by counsel for defendant in error that the certificate of registration indorsed upon the bonds by the State auditor, based upon the certificate of E. S. Potter, assuming to act as supervisor of the town, estops the town from making the defenses now interposed.

The following are the material portions of the act in force April 16, 1869, under which the bonds were registered in the auditor's office :

"§ 7. And it shall not be lawful to register any bonds under the provisions of this act, or to receive any of the benefits or advantages to be derived from this act, until after the railroad, in aid of the construction of which the debt was incurred, shall have been completed near to, or in such county, township, city or town, and cars shall have run thereon ; and none of the benefits, advantages or provisions of this act shall apply to any debt, unless the subscription or donation creating such debt was first submitteed to an election of the legal voters of said county, township, city or town, under the provisions of the laws of this State,

and a majority of the legal voters living in said county, township, city or town, were in favor of such aid, subscription or donation.

"And any county, township, city or town, shall have the right, upon making any subscription or donation to any railroad company, to prescribe the conditions upon which such bonds, subscriptions or donations shall be made, and such bonds, subscriptions or donations shall not be valid and binding, until such conditions precedent shall have been complied with.

"And the presiding judge of the county court, or the supervisor of the township, or the chief executive officer of the city or town that shall have issued bonds to any railway or railways, immediately upon the completion of the same near to, into or through such county, township, city or town, as may have been agreed upon, and the running of the cars thereon, shall certify, under oath, that all the preliminary conditions in this act required to be done to authorize the registration of such bonds, and to entitle them to the benefit of this act, have been complied with, and shall transmit the same to the State auditor with a statement of the date, amount, number, maturity and rate of interest of such bonds, and to what company, and under what law issued; and thereupon the said bonds shall be subject to registration by the State auditor, as hereinbefore provided."

Rev. Stat. Ill., Chap. 113, ¶ 17.

The "benefits or advantages of this act" above referred to consists in the provisions of the act for the levy and collection of taxes to pay the interest on the bonds registered thereunder in like manner as the State taxes are levied and collected, and also certain other provisions setting apart certain other taxes to be applied to the same purpose.

*Ibid.* ¶¶ 11, 14, 15 and 19.

1. The registration of the bonds by the State auditor appears to have been based upon a certificate signed by E. S. Potter as supervisor of the town, dated and sworn to before James H. Cartwright, as justice of the peace, on the *first day of April*, 1871.

This certificate appears from the record to have been *transmitted to* and filed in the office of the auditor of public accounts June 5, 1871, and on that day the bonds appear

to have been registered in that office. (*Ante*, pp. 12–14.) The certificate of the State auditor on each bond is dated June 5, 1871, and merely states "that the within bond has "been registered in this office this day, pursuant to the pro- "visions of 'an act to fund and provide for paying the rail- "road debts of counties, townships, cities and towns,' in "force April 16, 1869." (Printed Rec. pp. 80, 141.)

It is an indisputable fact in the case that E. S. Potter did not receive his pretended appointment, and that he had no color of title to the office of supervisor of the town until the night of April 3, 1871. (*Ib.* p. 145.) It is also an admitted fact "that George M. Dwight was elected supervisor of the "said town of Oregon at the annual town meeting held "therein April 4, 1871, and duly qualified as such supervisor "on the 10th day of April, 1871, and held said office for "the next ensuing year." (*Ante*, p. 83.)

It therefore appears that on April 1, 1871, at the date Potter appears to have made the sworn certificate upon which the bonds were registered, he had no pretense of title to the office of supervisor; and that said certificate so made by him was not transmitted to and filed in the office of the State auditor until about two months after George M. Dwight had been duly elected and qualified as supervisor. And this officer appears to have had nothing to do with the making or transmitting of such certificate to the State auditor. (Printed Rec. 143.)

The statute, as we have seen, required this certifitate not only to be made and sworn to by the supervisor of the town, but also requires that officer to transmit the same to the State auditor.

Whatever might be the effect of the sworn certificate made by the supervisor of the town, and transmitted by him to the State auditor, as required by the statute, it will not be contended, we presume, that the town could be estopped by the secret and fraudulent act of one, who, at the time had no color or pretense of title to the office of supervisor.

Even though Potter was the acting supervisor when he signed and swore to the certificate, yet if it was not transmitted by him to the auditor until months after the expiration of his official term, and the election and qualification of his successor, without the approval or sanction of the supervisor in office at the time of such transmittal, it would certainly not be obligatory upon the town as an estoppel.

*Anthony* v. *Co. of Jasper*, 101 U. S. 693, 698, 700.
*Merchants' Bank* v. *Bergen County*, 115 U. S. 390.

2. The certificate of registration, as well as the certificates of the county officers, upon which the registration was made, as also the law of Nebraska in that behalf, were much stronger in the case of *Dixon County* v. *Field*, 111 U. S. 83, than in the present case. Speaking of the effect of such certificates, as estoppels in that case, this Court says:

"The sixth section of chapter 35 of the general statutes [of Nebraska], act of February 15, 1869, p. 93, provides that 'any county or city which shall have issued its bonds in pursuance of this act shall be estopped from pleading want of consideration therefor;' and an act passed February 25, 1875, authorizes the registration of county bonds, with a view to their collection and redemption. It requires the county officers, in the first place, to make registration of all the named particulars in respect to the bonds issued by them, a certified statement of which, made out and transmitted by them, is required to be recorded by the auditor of State. Whenever the holders of county bonds shall present the same to the auditor of State for registration, the auditor, upon being satisfied that such bonds have been issued according to law, it is further provided, shall register the same in his office in a book to be kept for that purpose, in the same manner that such bonds are registered by the officers issuing the same, and shall, under his seal of office, certify upon such bonds the fact that they have been regularly and legally issued, and that such bonds have been registered in his office, in accordance with the provisions of the act. This registration is made the basis on which he ascertains the amount of taxes annually to be levied, to meet the accruing interest and sinking fund to be certified to the county clerk, who is to ascertain and levy the tax for that purpose, to be collected and paid to the county treasurer.

"The section of article XII of the constitution already cited requires, as essential to the validity of municipal bonds, an indorsement thereon of a certificate signed by the secretary of State and auditor of State, showing that the same is issued in pursuance of law. No conclusive effect is given by the constitution or the statute to this registration or to these certificates; and in the consideration of the question of estoppel they may be laid out of view." (*Ib.*, 91.)

Neither does the statute or the constitution of Illinois give any conclusive effect to such certificates. The sole object of registration under the law of Illinois, is to give the parties owning the bonds the benefit of the provisions of the registration act, in respect to the levy and collection of taxes to provide for their payment. The registration added nothing to the validity of the bonds as obligations of the town. Under the Illinois statute, the registration was not required to be made until after the bonds had been issued and passed into circulation.

Therefore, in this case, the certificates made in connection with the registration of the bonds must be disregarded, or laid out of view, upon the question of estoppel.

3. The certificate made by Potter to the State auditor concludes with these words: "*To the best of my knowledge "and belief.*" (*Ante* p. 13.)

He seems to have been unwilling to state and swear positively that the statements contained in the certificate were true. While this qualified statement may have been sufficient to entitle the bonds to registration, the statement can not be treated as absolute and unqualified when it is sought to use the same as an estoppel.

If such a certificate could be held to operate as an estoppel against the town at all, it would only estop the town from showing that according to "the best knowledge and belief" of Mr. Potter, the statements therein contained were untrue. It could not estop the town from showing that Mr. Potter was mistaken in his opinion of the matter, and that the same was in fact untrue.

4. "The purpose for which a recital was made must aalwys be considered, and its effect limited accordingly,

however general its language. Recitals are generally made for the purpose of carrying into effect or aiding thereto, the general object of the deed, and not for collateral purposes; and hence, the rule is, that a recital is conclusive of the facts stated only in an action of which the deed [containing the recital] itself is the foundation or defense."

Bigelow on Estoppel, p. 255.
*Carpenter* v. *Buller*, 8 Meeson and Welsby, 209.

This principle is fully illustrated by the case of *Lainson* v. *Tremere*, 1 Adolphus and Ellis, 792 (28 E. C. L., 367) This was an action of debt upon a bond made by the lessee and others, as his sureties, to the lessor, to secure the payment of the rent, reserved in an indenture of lease of the same date, between the principal parties. The condition of the bond recited £170 as the annual rent to be paid.

It was held that in such action on the bond the defendants were estopped from pleading that the rent actually stipulated to be paid by the lease was only £140, and that this amount had been paid. In the opinion, the court say: "Upon what appears upon the record, there is no doubt "but, if an action of covenant had been brought on the "lease, only £140 could be recovered," but it was held otherwise in the action of debt upon the bond.

*Lainson* v. *Tremere*, 28 E. C. L., 367, *372*.
*Carpenter* v. *Buller*, *supra*.

Under the laws of Illinois the certificate of the supervisor forms no part of the bonds, nor is it an act essential to their complete execution. The object of the certificate is to secure the registration of the bonds and to secure for them the benefits of the registration act. No question is involved in this action as to any right arising under the registration law. The action is brought upon the coupons attached to the bonds, directly against the town, to recover a money judgment.

At most, the certificate made to the State auditor is collateral to the purposes of this action, and upon both principle and authority such certificate can not be regarded as an estoppel in a suit upon the bonds or coupons, which in no

wise seeks to enforce rights claimed under the registration act.

5. "*Privity* in the law of estoppel, it should be observed, has a different and narrower signification than *privity* in contract. In the law of estoppel, privity signifies merely the succession of rights—the devolution of the rights of one person upon another, as in the case of an assignee in bankruptcy."

Bigelow on Estoppel, p. 252.

The certificate upon which the bonds are registered is required to be made and transmitted by the supervisor of the town to the State auditor. It is not made *to* the payee or holder of the bonds. It is not properly made until after the bonds have been executed and delivered to the obligee or payee therein; and is not required to be made until after the bonds have been put in circulation by the first holder. It is clear that neither the payee, nor any subsequent holder of the bonds, sustained any such relation to the certificate as to entitle him to claim the benefit thereof as an estoppel, in an action on the bond. It was *res inter alios acta.*

Bigelow on Estoppel, 242, note (*a*).

## VI.

### NO ESTOPPEL ARISES FROM THE RECITALS CONTAINED IN THE CAPTION TO THE REGISTRATION OF THE BONDS IN THE SUPERVISOR'S BOOK.

This caption is set out in the statement of the case. (*Ante* p. 11.) The only law authorizing any such registration by the town supervisor is the first paragraph of § 2 of the registration law of April 16, 1869, which provides thus:

"§ 2. And the county clerk or *other proper officer*, upon the issuing of the bonds in payment of said railroad debt, shall make a registration thereof in a book to be kept for that purpose *in his office*, showing the date, amount, number, maturity and rate of interest of such bonds, and upon the subscription or donation to what railroad the same was given. And the said bonds, and bonds heretofore issued

and still unpaid, in order to receive the benefits of this act, shall be registered *by the holder thereof*, at the office of the auditor of public accounts, who shall cause the same to be registered in a book kept for that purpose."

Rev. Stat. of Ill., Chap. 113, ¶ 12.

It will be observed that this statute does not authorize the supervisor, in his registration of the bonds, to make or enter therein any recital or statement as to whether the bonds were issued in compliance with the vote of the people, or any statement respecting the regularity of the election held to authorize the issue of the bonds. If the supervisor saw fit to make any such entry or statement in connection with his registration of the bonds, the same would be a mere voluntary statement on his part, wholly unauthorized by law. Such a statement so made by the supervisor, would be wanting in every essential element to create an estoppel against the town.

But the evidence shows that this entry in the town supervisor's book was not made by the supervisor of the town, nor by any one authorized by the supervisor to make the same. It appears from the testimony of Mr. Dutcher that this entry in the supervisor's book is in the handwriting of James H. Cartwright, the attorney of the railroad company, and the justice of the peace, who joined in the conspiracy to confer upon Potter his colorable appointment as supervisor in order that he might issue the bonds before the people could elect a supervisor to act for them; and that said Cartwright so registered the bonds in the supervisor's book *after* George M. Dwight had been elected and qualified as supervisor of the town, and while he held that office. (Printed Rec. p. 153.)

It appears from Dwight's testimony that he never authorized such registration, and knew nothing of it until after he obtained the supervisor's books from Cartwright's office some time in September, 1871. (*Ibid.* p. 143.)

It is deemed unnecessary to enter into an argument to show that such an entry so made without authority, and signed by no one, will not estop the town from showing the

truth in defense of this action. We submit that the court below erred in not excluding this entry in the supervisor's book, and that the exception to that ruling was well taken.

## VII.

THE TOWN IS NOT ESTOPPED BY THE RECOVERY IN THE FORMER SUIT BROUGHT BY WALLACE UPON OTHER COUPONS, FROM MAKING THE DEFENSE SET UP IN THE SPECIAL PLEAS IN THIS SUIT.

The recovery in the Wallace suit was not upon the same coupons, or cause of action, as the present suit, but upon other coupons, which were probably detached from certain of the bonds of the same series as those involved in this suit. The present suit is not upon that judgment, but upon other coupons than those merged in that judgment. The evidence is clear and uncontradicted that neither of the defenses set up in the three special pleas in this suit were made or actually litigated in the Wallace suit. (Printed Rec. p. 156.) The law is now well settled in this court, that under such circumstances, the recovery in the former suit is only an estoppel upon the matters embraced within the pleadings, and *actually litigated* in such former suit. It is not an estoppel upon matters which might have been, but in fact were not actually litigated in such former suit.

*Cromwell* v. *County of Sac*, 94 U. S. 351.
*Davis* v. *Brown*, Ib. 423.
*Russell* v. *Place*, Ib. 608.
*Nesbit* v. *Ind. School Dist.*, 25 Fed. Rep. 635.
*Geneva Nat. Bank* v. *Ind. School Dist.*, Ib. 629.

In *Cromwell* v. *County of Sac*, *supra*, it is held that:

"There is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action, * * not only as to every

matter which was offered and received, to maintain or defeat the claim or defense, but as to any other admissible matter which might have been offered for that purpose." * * * * *

"But where the second action between the same parties is upon a different claim or demand, *the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.* In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must be as to the point or question *actually litigated* and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action." (*Ibid.* p. 352–3.)

After reviewing the authorities the opinion continues:

"These cases, usually cited in support of the doctrine that the determination of a question directly involved in one action is conclusive on that question in a second suit, between the same parties, upon a different cause of action *negative the proposition that the estoppel can extend beyond the point actually litigated.*" (*Ibid.*, 354.)

"It is not believed that there are any cases going to the extent of holding that because, in the prior action, a different question from that actually determined might have arisen and been litigated, therefore such possible question is to be considered as excluded from consideration in a second action between the same parties on a different demand, *although loose remarks, looking in that direction, may be found in some* opinions. On principle, a point not in litigation in one action can not be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action. Various considerations, other than the actual merits, may govern a party in bringing forward grounds of recovery or defense in one action, which may not exist in another action upon a different demand, such as the smallness of the amount, or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation and his own situation at the time." (*Ibid.*, 356.)

In the later case of *Russell* v. *Place*, 94 U. S. 608, the court reiterates the same principle as the settled law, thus:

"It is undoubtedly settled law that a judgment of a court

of competent jurisdiction, upon a question *directly* involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record, or be shown by extrinsic evidence, that the precise question was *raised and determined in the former suit.* If there be any uncertainty on this head in the record, as for example, if it appear that several distinct matters *may* have been litigated, upon one or more of which the judgment *may* have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered, the whole subject matter of the action will be at large, and open to a new contention, unless this uncertainty is removed by extrinsic evidence showing the precise point determined. To apply the judgment and give effect to the adjudication *actually made*, when the record leaves the matter in doubt, such evidence is admissible." * * * * * * "That to render the judgment conclusive, it must appear by the record of the prior suit that the particular matter sought to be concluded *was necessarily tried or determined;* that is, that the verdict in the suit could not have been rendered without deciding that matter; or it must be shown by extrinsic evidence, *consistent with the record*, that the verdict and judgment necessarily involved the consideration and determination of that matter."

1. *As to the defense interposed by the second plea.*

The facts averred in this plea showed that the *making and executing* of the coupons sued upon was obtained by fraud and circumvention. This defense, as against a *bona fide* assignee, was authorized by the statute of Illinois, as we have shown *ante*, p. 34.

The same statute required this defense to be pleaded; and the settled rule in Illinois is that to make this defense available against a *bona fide* assignee, the same must be specially pleaded as required by the statute authorizing it; and that such defense can not be proven under the general issue against a *bona fide* assignee.

*Anderson* v. *Jackson*, 66 Ill. 523.
*Cole* v. *Joliet Opera House Co.*, 79 Ill. 96.
*Sims* v. *Klein*, Breese Rep. 302.

It appears that the only plea filed in the Wallace suit

was the general issue of *non-assumpsit* (*ante* 9). It also appears from the record that upon the trial of the Wallace suit, the deposition of Eliza Jennings was read in evidence, showing that she was the real owner and *bona fide* holder for value of the bonds and coupons involved in that suit without notice of the defense sought to be made; and that she had sent the coupons to Wallace for collection, who brought the suit thereon in his own name as plaintiff. (Printed Rec. pp. 124–126.)

It is true that the record shows that substantially the same evidence tending to show fraud and circumvention, etc., was introduced on the trial of the Wallace suit as was introduced in this suit. (*Ib.*, pp. 84–102.) And we concede that it was competent to introduce that evidence under the general issue in that case. But the effect of the introduction of such evidence under the general issue was merely to cast the burden of proof on Mrs. Jennings to show that she was a *bona fide* purchaser for value, etc.

*Smith* v. *Sac County*, 11 Wall. 139.

When her deposition was read showing that she was such holder for value, before the maturity of the paper, without notice, etc., the same was a complete answer to the evidence tending to show fraud, introduced under the general issue. It appears to have been so regarded on the trial. (Printed Rec. 156.) Under the pleadings and evidence in that case, a verdict could have been, and in fact was, found for the plaintiff therein, without passing upon the question of fraud. This appears to have been the substance of the charge of the court to the jury in that case. (*Ibid.*, 119, 120.)

But as we have already shown (*ante*, 34), where this statutory defense is specially pleaded as required by the statute, it is no answer thereto to show that the plaintiff is a *bona fide* holder of the paper. The statute authorizes the defense to be pleaded, not only against the party practicing the fraud, but also against "any assignee or assignees of such instrument."

It has never been held that the judgment in a former suit

can be set up in a subsequent suit upon a different cause of action, as an estoppel to a defense which could not have been made under the pleadings in such former suit.

The rule is well expressed in Herman on Estoppel, § 91, thus:

"But while parol evidence may sometimes be admitted for the *purpose of limiting the estoppel*, it is never allowed to *enlarge its operation*, or to show that matters foreign to the record were embraced in the verdict."

In other words, the extrinsic evidence must be "consistent with the record," as expressed in

*Russell* v. *Place*, 94 U. S. 609.

Inasmuch as the defense that the making and execution of the coupons was obtained by fraud and circumvention could not properly have been made against a *bona fide* assignee under the pleadings in the former suit, it is not consistent with the record to admit extrinsic evidence to show that such defense was made in that suit. Under the pleadings and evidence in that suit, it was unnecessary that the jury should pass upon the question of fraud in order to find a verdict for the plaintiff therein. This being the case, it is immaterial what evidence tending to show fraud was introduced on that trial.

2. *As to the defense interposed by the third plea.*

In order to make a defense under § 12, Art. IX of the constitution imposing the five per cent. limitation on municipal indebtedness, it was necessary, at least, to show what was the assessed value of the taxable property of the town. It appears that no such evidence was introduced on the trial of the Wallace suit, and that no question was raised therein, under that section of the constitution. (Printed Rec.p. 156.)

It was clearly competent for the defendant to show that the defense set up in this plea was not litigated in the Wallace suit.

"§ 274. If it appears, *prima facie*, that a question has been adjudicated, it may be proved by parol testimony that such question was not in fact decided in the former suit. Where

items could have been proved in a former action, the presumption arises that they were proved, but it may be rebutted *aliunde*. If a matter were pleaded as a credit, it is competent to show that it was not offered *as a credit* on the trial. and that the court in deciding the case expressly excluded it from consideration."

Freeman on Judgments, § 274.

The rule is thus accurately and concisely stated by Mr. Justice Barrows in *Sturtevant* v. *Randall*, 53 Maine, 149:

"What appears by the record is to be proved by the record only, and nothing contradictory thereto can be admitted; but what need not, and in fact does not, appear by the record, if necessary to establish the identity of the subject matter, or of the grounds upon which the judgment proceeded, may be supplied by parol proof, *to the extent of showing whether matters that might have been admissible under the pleadings were, or were not, actually presented and considered in the adjudication.*"

*Barger* v. *Hobbs*, 67 Ill. 598.

The matter set up as an estoppel must not only have been embraced within the issues as formed by the pleadings, but where the pleadings are general, and do not on their face present a direct issue on such matter, it must also be shown that the same *was in fact set up and actually litigated in such former suit*. Thus in the case of *Davis* v. *Brown*, 94 U. S. 423, it was held that the defendant was not estopped by the former adjudication from setting up in the subsequent suit, a defense which might, had the defendant seen fit to do so, have been proven under the general issue which was pleaded in the former suit, but which the defendant did not, as found by the court, actually litigate in such former suit, the same having been unsuccessfully defended on other grounds, by the "advice of counsel learned in the law." (*Ib.*, p. 428.)

There is no question but what the defense offered in *Davis* v. *Brown*, *supra*, could have been proven under the general issue in the former suit, had the defendants seen fit to offer such proof.

2 Greenleaf on Evidence, § 135.

1 Chitty on Pleading, * 476–478.
*Wilson* v. *King*, 83 Ill. 232.

The fact, however, that they did not actually litigate and rely upon that defense in the former suit, was held to destroy the effect of the judgment therein, as an estoppel upon that question in the subsequent suit, upon other notes of the same series, which were subject to the same defense.

*Davis* v. *Brown*, 94 U. S. 428, and other authorities cited *ante* p. 74.

In the case of *Packet Company* v. *Sickles*, 5 Wall. 592, this court said:

"As we understand the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties, when the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive, *per se*, it must appear by the record of the prior suit, that the particular controversy sought to be concluded was necessarily tried and determined—that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties; and, further, in cases where the record itself does not show that the matter was necessarily and directly found by the jury, evidence *aliunde* consistent with the record may be received to prove the fact; but, even where it appears from the extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be concluded."

The principles there announced were re-affirmed and treated as the settled doctrine of this Court in *Russell* v. *Place*, 94 U. S. 608.

Upon the principles established by these authorities it is clear that the town is not estopped by the verdict and judgment in the Wallace suit from making, in this suit, the defense set up in the third plea. It affirmatively appears that the town did not set up and actually litigate that defense in the former suit.

3. *As to the defense made by the fourth plea.*

The evidence shows that no question was raised or decided on the trial of the Wallace suit as to whether the vote to authorize the making of the donation could have been lawfully taken at a special town meeting presided over by a moderator, instead of being taken at an election presided over by the three election judges. (Printed Rec. 157.)

Such being the case, it is submitted upon the authorities before cited that the town is not thereby estopped from making that defense in this suit.

CONCLUSION.

Each of the three special pleas was fully proven. If any one of the pleas stated a sufficient defense the verdict ought to have been for the defendant. There was nothing in the recitals contained in the bonds, nor in the certificates connected with their registration, nor in the verdict and judgment in the Wallace suit, which estopped or precluded the town from making the defenses interposed by those pleas. It is submitted that the court below erred in refusing the several instructions requested by the plaintiff in error, as well as in directing the jury to find a verdict for the defendant in error.

JAMES K. EDSALL,
*For Plaintiff in Error.*

IN THE

# SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1886.

TOWN OF OREGON,
*Plaintiff in Error,*
*vs.*
ELIZA JENNINGS,
*Defendant in Error.*

*Error to*
*Circuit Court U. S.,*
*for the Northern*
*District of Illinois.*

## Brief in Reply for Plaintiff in Error.

JAMES K. EDSALL,
*For Plaintiff in Error.*

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## Brief in Reply for Plaintiff in Error.

As respects the defense made under the third plea, the course of the argument has developed but very few disputed questions between the counsel for the respective parties; and inasmuch as a determination of those questions in favor of the plaintiff in error, will be conclusive of the case, it may be advisable to first consider them.

At the head of the third division of the argument of the learned counsel for the defendant in error (page 45) we find the following proposition printed in italics:

"Our answer to the defense set up by the third plea is "that the town is estopped from setting up that the bonds "were not issued in compliance with the vote."

And on the next page, 46, we find the following:

"We presume the first question which will naturally suggest itself to the court in the consideration of the questions which arise under the defense set up by the defendant's third plea is: Why was Sec. 12, Art. IX, invoked by the defendant at all? Why did not the defendant rely upon

the provisions in the act of April 16, 1869, which are certainly as favorable to the town as those relied upon in the constitution? *They both in effect forbid bonds in a case like the present to be issued except in compliance with the vote of the municipality.*"

Our answer to the questions thus propounded is this: While we agree with the learned counsel that the provisions of § 12, Art. IX, of the Constitution, "in effect forbid bonds in a case like the present, to be issued, except *in compliance* with the vote of the municipality," it is not so clear that the provision of the act of April 16, 1869, there referred to and quoted, forbade the *issue* of the bonds *before* the conditions of the vote had been complied with. The statute of April, 16, 1869, provides that "such bonds, subscriptions and donations shall not be valid and binding *until* such conditions precedent shall have been complied with." It is thus apparently contemplated by this statute that the bonds may be issued *before* the conditions are complied with, but that the binding efficacy of the bonds is made dependent upon the subsequent compliance with the conditions. This seems to have been the view taken of the statute in the case of *Insurance Co.* v. *Bruce*, 105 U. S., where in the opinion at page 331, it is said: "Consistently with the statute the town could issue and deliver the bonds for the subscription *in advance* of the construction of any part of the road." And on page 332 of this opinion, referring to the construction placed on this statute by the Supreme Court of Illinois, in a case there cited, this Court adds:

"The court sustaining that act, held that there was *no want of* power, to make the subscription *and issue the bonds;* that if the town so willed, *the subscription could be made and bonds issued in advance of the compliance with any condition imposed by the popular vote.*" And this Court held that the recitals of the bonds in that case, which in express terms referred not only to the act to incorporate the railroad company, but also to the act of April 16, 1869, as the authority by virtue of which they were issued, "fairly imported that nothing remained to be done in order to make the bonds binding obligations in the hands of a *bona fide* holder."

*Insurance Co.* v. *Bruce*, 105 U. S. 328, 332.

It thus appears that as construed by this Court as well as the State Court, the provision of the act of April 16, 1869, referred to, did not absolutely *deprive the town of all power* to issue the bonds without compliance with the conditions of the vote.

It is clearly otherwise with § 12, Art. IX, of the Constitution. That section absolutely forbade the creation of municipal indebtedness, in any manner or for any purpose in excess of the five per cent. limitation thereby imposed, without "*compliance* with the vote of the people," etc. (See Argument for plaintiff in error, pp. 42, 45.)

The difference, therefore, between the provisions of the Act of April 16, 1869, referred to, and § 12, Art. IX, of the Constitution, is this: The former it appears *did not*, but the latter most clearly does, *deprive municipalities of all power*, to issue bonds and create an indebtedness in excess of the five per cent. limitation, without compliance with the vote of the people.

And for this reason it was thought advisable to aver facts in our third plea, and sustain the same by proof or stipulation on the trial, showing that the bonds in question were wholly in excess of the five per cent. limitation imposed by § 12, Art. IX, of the Constitution, and that the same were not issued in compliance with the vote of the people, as required by that section. By so doing we showed an absolute *want of power* to issue the bonds and create the indebtedness, at the time the bonds were signed.

Inasmuch as our learned brother concedes in his argument (page 46) that § 12, Art. IX, of the Constitution in effect forbids the issue of the bonds in a case like the present, "except in compliance with the vote of the municipality," the contention between us, as to the defense made by the third plea, is narrowed down to this:

Is there anything appearing in the record which shows that the town of Oregon is estopped from proving as a defense to this action, the fact that the bonds in question were not

issued in compliance with the vote of the people of that town?

As we have shown, the counsel for defendant in error in his argument, at page 45, bases his answer to the defense made under the third plea, exclusively, upon the maintenance of the affirmative of this question. And in support thereof, at page 59 of his argument he insists:

*First.* "It is not enough for the town to show that the vote was on condition that the road should be completed by January 1, 1871, *but the town should also have shown that when the bonds were issued the town was not estopped from objecting to the delay of three months in the completion of the road.*"

The familiar rule, that matters of estoppel must be averred and proven by the party seeking to take advantage of them, and that courts will not presume their existence without proof, is submitted as a sufficient reply to this branch of the argument.

The case of *People ex rel.* v. *Holden et al.*, 82 Ill. 94, frequently cited, and from which liberal quotations are made in the argument, affords no countenance to this proposition of counsel. The court there held that the petition for mandamus in that case, which showed on its face a substantial compliance with the conditions of the vote, was *prima facie* sufficient, and reversed and remanded the case, with the direction that the demurrer to the petition be overruled. Whereupon it appears that the respondents answered the petition, and denied that the conditions of the vote had been complied with according to its terms. The Supreme Court of the State held in the same case, reported in 91 Ill. 446, that this answer showed a sufficient defense to the petition, and affirmed the judgment of the court below, overruling a demurrer to the answer and denying the application for mandamus.

*People ex rel.* v. *Holden et al.*, 91 Ill. 446.

The actual decision of the court in that case is consistent with its decisions in other cases of like character, cited in our argument at pages 51 and 52, and does not militate against the positions for which we here contend.

*Second.* But it is urged that the following recitals contained in the bonds in question estop the town from interposing the defense set up in the third plea.

"For which payment of principal and interest, well and truly to be made, the faith, credit and property of the said town of Oregon are hereby solemnly pledged, under authority of an act of the General Assembly of the State of Illinois, entitled 'An act to amend an act entitled an act to incorporate the Ogle and Carroll County Railroad Company,' which said act was approved March 30, 1869. This bond is one of a series numbering from twenty-one to sixty inclusive, for $1,000 each, which bonds so numbered, together with another series numbered from one to twenty, inclusive, for $500 each, are the *only* bonds issued by said town of Oregon, under and by virtue of said act."

The first part of this recital purports to pledge the faith, credit and property of the town under authority of the act therein mentioned; but inasmuch as there is nothing in the act of March 30, 1869, referred to, authorizing the supervisor or town clerk to make any such pledge in behalf of the town, it is difficult to perceive how that part of the recital can be raised to the dignity of an estoppel upon any question of fact material to the determination of this case. It certainly does not embrace the question of fact as to whether the conditions imposed by the vote of the people had been complied with as required by § 12, Art. IX, of the Constitution.

It may be an exceedingly resonant and fine rhetorical expression, such as a fraudulent pretender to the office of supervisor could well afford to adopt while secretly signing bonds in behalf of the people and taxpayers of a town whom he had no right to represent; but it is certainly barren of any clear and unambiguous statement of fact, possessing the essential elements of an estoppel.

The latter part of the recital merely states that the series of bonds in question, with twenty others "for $500 each, are the *only* bonds issued by the said town of Oregon, under and by virtue of said act."

All that is positively affirmed in this branch of the recit-

al is, that *no other* bonds than those mentioned were issued under and by virtue of the act referred to. It is only by inference or implication that any assurance is given that these bonds were issued "under and by virtue of said act." This we submit, is too ambiguous and uncertain a statement upon which to base an estoppel.

Conceding, however, for the purposes of the argument, that the recitals fairly import all that counsel for defendant in error claim for them, the result will be the same. In his argument at page 50, the learned counsel lays down this proposition, which we literally reproduce, including the italicized words, thus:

"But the bonds recite, in substance, that they *were* issued '*under authority of*' and '*by virtue of*' a law of the State, to wit, the act of March 30, 1869."

The sections of the act of March 30, 1869, thus referred to were set out in the declaration, and appear in the printed record, pp. 3 to 5. A reference thereto will show that that act does not require the vote to be taken prior to the adoption of the constitution in 1870, and is wholly silent upon the question of compliance with the terms of the vote on the part of the railroad corporation.

The express authority to impose such conditions by the vote of the people, was conferred by a provision contained in the general registration law of April 16, 1869, set out in our argument, page 67, and also quoted in the argument for defendant in error, page 46. And section 12, Art. IX, of the Constitution, as we have seen, made compliance with such conditions so prescribed essential to the existence of the power to issue bonds and create indebtedness in excess of the five per cent. limitation thereby imposed. The recital, in its most favorable construction, simply referred to the act of March 30, 1869, as the authority under and by virtue of which the bonds were issued, but made no reference either to the act of April 16, 1869, or to section 12, Article IX, of the Constitution.

In this particular the recital is unlike the recital in the case of *Ins. Co.* v. *Bruce*, 105 U. S. 328, so much

relied upon by our learned brother. Assuming that the recital in these bonds imports a substantial compliance with everything prescribed by the act of March 30, 1869, therein referred to, the same can not be so extended by construction as to import a compliance, either with the provisions of the act of April 16, 1869, or the constitution of 1870, neither of which are mentioned in the recital.

The reasoning of the court in *Buchanan* v. *Litchfield*, 102 U. S. 278, is conclusive upon this question.

This Court by Mr. JUSTICE HARLAN, there says:

"Returning to the case in hand, it will be observed that the bonds issued by the city of Litchfield, contain no recital whatever of the circumstances which under the Constitution of the State, must have existed before the city could legally incur the indebtedness for which the bonds were issued. They purport, it is true, to be issued under the authority of the act of April 15, 1873, and in pursuance of the ordinance of the city, based upon that statute. But that statute does not *expressly* restrict the exercise of the power to erect and maintain a system of water works to cases in which the aggregate indebtedness of the city was within the limits, which the constitution declared no municipal corporation should exceed. Nor does the city ordinance recite or state, even in general terms, that the proposed indebtedness was incurred in pursuance of or in accordance with the constitution of the State, or under the circumstances which permitted the issue of the bonds. Consequently, a recital that the bonds were issued *under the authority of the statute*, and in pursuance of the city ordinance, did not necessarily import a compliance with the constitution. Had the bonds made the additional recital that they were issued in accordance with the constitution, or had the ordinance stated in any form that the proposed indebtedness was within the constitutional limit, or had the statute restricted the exercise of the authority therein conferred to those municipal corporations, whose indebtedness did not, at the time, exceed the constitutional limit, there would have been ground for holding that the city could not, as against the plaintiff, dispute the fair inference to be drawn from such recital or statement as to the extent of its existing indebtedness.

"Any different conclusion from that indicated would extend the doctrines of this court upon the subject of munic-

ipal bonds further than would be consistent with reason and sound policy, and further than we are now willing to go. The present action can not be maintained unless we should hold that the *mere fact* that the bonds *were* issued, without any recitals of the circumstances bringing them within the limit fixed by the constitution, was in itself conclusive proof in favor of a *bona fide* holder, that the circumstances existed which authorized them to be issued. We can not so hold."

*Buchanan* v. *Litchfield*, 102 U. S. 292.

The same principles were re-affirmed by this court in *School District* v. *Stone*, 106 U. S. 183. It is there held that:

"Where the holder relies for protection upon mere recitals, they should at least be clear and unambiguous, in order to estop a municipal corporation, in whose name such bonds have been made, from showing that they were issued in violation or without authority of law." (Id. p. 186.)

The subsequent cases cited in our brief at page 25 show that the principles there announced are treated as the settled doctrine and rule of law in this court.

The reasoning of this court in *Buchanan* v. *Litchfield*, *supra*, is directly applicable to the bonds in question.

The bonds of the town of Oregon contain no recital whatever of the circumstances which, under the constitution of the State, must have existed before the town could legally incur the indebtedness for which the bonds were issued. We may concede that they purport to be issued under the authority and by virtue of the act of March 30, 1869, mentioned in the recital.

But that statute, as in the case of *Buchanan* v. *Litchfield*, did not *expressly* restrict the exercise of the power to issue the bonds and create the indebtedness to cases in which the aggregate indebtedness of the town was within the limit which the constitution declared no municipal corporation should exceed; nor does it expressly require compliance with the vote of the people. Nor does the recital state, even in general terms, that the proposed indebtedness was incurred in pursuance of or in accordance with the constitution of the State, or under the circumstances which permitted the issue of the bonds.

There is no recital that the bonds were issued in compliance with any vote of the people. Consequently a recital that the bonds were issued under authority of and by virtue of the act of March 30, 1869, did not necessarily import a compliance with the constitution, nor with the vote of the people had prior to its adoption.

In the present case, like *Buchanan* v. *Litchfield, supra*, the action can not be maintained unless it is held that the *mere fact* that the bonds *were* issued, without any recitals of the circumstances bringing them within the limit fixed by the constitution, or that the condition of the vote had been complied with, was, in itself, conclusive proof, in favor of a *bona fide* holder, that the circumstances existed which authorized them to be issued.

It is true that after the adoption of the constitution of 1870, the act of March 30, 1869, was so affected thereby that in reality it only conferred authority to issue bonds in conformity to the requirements of the constitution. It will not be held, however, that a recital that the bonds were issued by authority of the act would necessarily import compliance with the constitution, to which no reference is made in the recital. This would be in direct contravention of the ruling in *Buchanan* v. *Litchfield, supra.*

The act of April 15, 1873, referred to in the recital in that case, was necessarily subordinate to the provisions of the constitution of 1870, and conferred no authority to issue bonds in excess of the constitutional limitation. Nevertheless, a recital that the bonds were issued under and by authority of that act was held not to estop the city from showing that the same were issued in excess of the constitutional limitation. The fact that the provisions of that *act* are subordinate to and qualified by the constitution, does not make a recital of conformity to the *act*, necessarily import compliance with the requirements of the constitution.

Counsel for defendant in error makes the point that the present case should be distinguished from *Buchanan* v. *Litchfield, supra*, because, in that case, the act of April 15, 1873, referred to, was passed after the adoption of the con-

stitution of 1870; while the act of March 30, 1869, was passed prior to the adoption of that constitution. We insist that this circumstance is immaterial. As to bonds issued after its adoption, the constitution was the supreme law of the State, and limited and qualified statutes passed prior to its adoption, as well as those subsequently passed:

In *Buchanan* v. *Litchfield* it was held:

"No legislation could confer upon a municipal corporation authority to contract indebtedness which the constitution expressly declared it should not be allowed to incur," citing *Law* v. *People*, 87 Ill. 385, and *Fuller* v. *City of Chicago*, 89 Id. 282.

Upon the adoption of the constitution in 1870, all existing laws so far as the same were repugnant to or in conflict with its provisions, were thereby repealed and became inoperative. No legislation was necessary to give effect to these prohibitions of power to create municipal indebtedness, contained in the constitution. (Id.)

At the time of the adoption of the constitution in 1870, the railroad company had done nothing toward the building of the railroad, and no proof was offered in support of the averment in the declaration that the company had formally accepted the proposed donation. The mere vote to make such a donation even if formally accepted, would not constitute an obligatory contract to make such donation.

*Town of Concord* v. *Savings Bank*, 92 U. S. 625, 630.
*Aspinwall* v *Comrs. of Co. of Daviess*, 22 How. 365.

And in case the *vote* to make the donation was held to be a *contract* to make the same, it would simply amount to a contract to make the donation on the terms and conditions specified in the vote. The saving clause to § 12, Art. IX, of the Constitution, permitted the bonds to be issued if done "*in compliance with the vote.*"

The defense made by the third plea rests upon the undisputed fact that the terms of the vote had not been complied with, and that the bonds were not issued in compliance

with such vote. The enforcement of § 12, Art. IX, of the Constitution, according to its terms, will not impair the obligation of any contract, should the vote be considered a contract.

Upon the question of estoppel by recitals, the learned counsel makes no reference to Potter's certificate to the State Auditor, and barely mentions the entry in the supervisor's book made by Cartwright, and apparently places no reliance upon either of them. As respects these matters, we refer to our argument at pages 67 and 73.

*Third.* The only other ground of estoppel apparently relied upon is based upon the charge of the court to the jury in the Wallace suit. Counsel for defendant in error thus states this point on page 67 of his argument:

"The question of whether the recitals in the bonds when properly construed amount to a declaration that the conditions of the vote have been complied with, is not open for controversy in this case. That question has become *res adjudicata* by the decision in the Wallace case."

This proposition presupposes or assumes that the charge of the court to the jury upon a question of law in one case, estops the parties thereto, or their privies, from contending in a subsequent case, *upon a different cause of action*, that the law of the case is not as thus stated or held by the court in its charge to the jury in such former suit. Undoubtedly the verdict and judgment in the Wallace suit is conclusive, in any collateral proceeding upon the cause of action upon which the judgment was recovered, notwithstanding there may have been error in the charge of the court which resulted in such judgment. The claim, however, that the ruling of the court upon questions of law in that case, binds all other courts in all subsequent suits between the same parties or their privies, *upon other and different causes of action*, to rule the same questions of law the same way, and thus repeat and perpetuate the same errors of law, (if any were made,) finds no support either in reason or authority. This would be an unwarrantable extension of the law of estoppel.

The judgment in the Wallace case, being for less than $5,000, was not reviewable in this court upon questions of law. It would be a gross and inexcusable perversion of justice to hold that the parties were precluded by the rulings of the court in that case, from having this court entertain jurisdiction to review a judgment for over $20,000, in a subsequent case, *upon a different cause of action*, simply because the Circuit Court had erred in its rulings upon the same questions of law in such former suit.

Passing this by, however, let us examine the question actually before the court and ruled upon in the Wallace case.

It is conceded that no defense was attempted to be made in that case under § 12, Art. IX, of the Constitution. The question as to whether, under the facts disclosed in this case, that section of the constitution *deprived the town of all power* to create an indebtedness in excess of the five per cent. limitation thereby imposed, without actual compliance with the conditions of the vote, was not before the court in the Wallace suit, and was not passed upon in that case.

As to *the bond* then before the court, it appears that the court thus charged the jury in that case:

"*This bond* bears upon its face the statement that it is issued by the authority of an act entitled [quoting title of said act of March 30, 1869.] Right upon the face of the bond it bears the assertion that it is issued in *conformity with the act in question.*"

To justify this statement, the bond then before the court must have contained different recitals from those contained in the bonds in this case. But assuming that the bonds are identical in their recitals, it does not appear that the court charged the jury that the recital in the bond then before the court asserted conformity with the requirements of Sec. 12, Art. IX, of the Constitution, or that the conditions of the vote were complied with.

That is the vital question raised in the present case under the third plea.

The requirements of the act of March 30, 1869, and

those of § 12, Art. IX, of the Constitution, are not identical. Conformity with one does not necessarily import conformity with the other.

The limitations upon the power to create municipal indebtedness imposed by that section made compliance with the vote of the people essential to the very *existence of power* to issue the bonds in question. (Argument for plaintiff in error, pp. 42–44.) It is urged, however, that the act of April 16, 1869, though not referred to in the charge of the court in the Wallace case, was in reality applicable to that case, and *might* have been relied on by the town in support of its defense, in case the town had seen fit to invoke its protection. As we have seen, (*ante*, p. 2) it was held by this Court in *Insurance Co.* v. *Bruce*, 105 U. S., that under the act of April 16, 1869, there was "*no want of power*" to issue the bonds, although the conditions of the vote had not been complied with. A case, therefore, to which the provisions of the act of April 16, 1869, may have been applicable, does not involve the same question of law, in this particular, as a case clearly brought within the prohibitions contained in § 12, Art. IX, of the Constitution. All the authorities agree that where there is a *want of power* to issue municipal bonds, as distinguished from an irregularity in the exercise of *an existing power*, a *bona fide* assignee of such paper stands in no better position than the first holder. In other words where there is a *want of power* no legal liability can be created. (See authorities cited on Brief pp. 25, 26.) That is the defense made by the third plea under §12, Art. IX, of the Constitution. No such defense was made, nor was any question raised under that section of the constitution in the Wallace suit.

Nor does it appear that any question was in fact raised and passed upon by the court in the Wallace suit, arising under the act of April 16, 1869. No reference was made to that act, either in the recital in the bonds, or in the charge of the court in that case.

It does not appear that any question under that act was *actually litigated* in the Wallace suit. So far as appears the

defense therein rested on other grounds. It is well settled in this court, that a judgment in a former suit between the same parties, or their privies, will *only* constitute an estoppel in a subsequent suit, *upon a different cause of action*, when it is affirmatively made to appear that the same questions were *actually litigated* in such former suit. (See authorities cited in Argument for pltf. in error pp. 74–76.)

The distinguishing characteristic of the defense made under the third plea is that it discloses facts which show an absolute want of power in the municipality to issue the bonds and create the indebtedness, at the time the same were issued. The conditions of the vote not having been complied with, and the time stipulated for such compliance having elapsed, so that the vote *never could be complied with*, section 12, Art. IX, of the Constitution absolutely forbade the issue of the bonds and the creation of an indebtedness exceeding the five per cent. limitation; and thus deprived the town of all power to issue the bonds in question.

The mere fact that the bonds were issued, without recitals showing that the requirements of the constitution were met, can not estop the town from showing a want of power to issue the bonds under the constitution.

It is contended that as a general rule *time* is not regarded as of the essence of a contract, and that municipal corporations, like other parties, have authority to waive strict compliance with a contract in point of time, or that they may extend time of performance. This may be true, in all cases where there exists in the municipality a *continuing* power to make such contracts containing such modified provisions. But that does not reach the difficulty here. After the adoption of the constitution in 1870, there was no *continuing power* existing in the municipality to change or modify the terms of the vote offering the proposed donation.

The established construction of the constitution of 1870 in the courts of Illinois in reference to municipal aid to railroads, is:

"That the obligations assumed then, under existing laws, can not, since the adoption of that instrument, *be enlarged or materially changed*, either by the action of the people of the municipality or its corporate authorities. All power is taken away, and the utmost that can be done is to make and complete the subscription or donation previously voted under then existing laws, *upon the same terms and conditions voted.* Subscriptions or donations on other terms would obviously require new consent on the part of the people of the municipality, *which can not be had for want of power.*"

*The People* v. *Jackson*, 92 Ill. 451.

*Middleport* v. *Ætna Life Ins. Co.*, 82 Ill. 562.

And as we have shown, Sec. 12, Art. IX, of the Constitution, absolutely prohibited the creation of an indebtedness in excess of the five per cent. limitation, otherwise than "in compliance" with such vote of the people, *had prior to its adoption.*

The vote of the people, actually taken in express terms, declared:

"*Said* VOTE and *donation of forty thousand dollars to be null and void* unless said first division of said railroad shall be completed and equipped as aforesaid on or before the first day of January, A. D. 1871; but in case the same shall be so completed and equipped *within the time aforesaid*, and said company shall execute and deliver said release, then the said bonds to be deliverable upon the demand of said company, and to bear date of the day of delivery." (Printed Rec., pp. 15, 83 and 107.)

The *vote* itself, as well as the proposed donation, were to be *null and void* in case the first division of the road was not completed within the time specified. When it is conceded that the road was not completed within the time specified, how can it be held that the bonds were issued "*in compliance*" with that vote, which by its own terms declared that in that event, *the vote and donation should be void*, and that the bonds should *not* be issued?

It is not a mere question of the right of parties to waive compliance with the conditions of their contracts, in its ordinary sense. It is a question of absolute want of power to issue the bonds and create the indebtedness in excess of

the five per cent. limitation imposed by the constitution, because the bonds were not issued in compliance with the vote of the people as required by the saving clause to § 12, Art. IX, of the Constitution. Under that section of the constitution, the vote must be complied with, *not waived*, in order to warrant the creation of an indebtedness in excess of the five per cent. limitation.

It is suggested that there was a *substantial* compliance with the vote; and that a delay of three months ought not be treated as a *substantial* departure from the terms of the vote. By the terms of the vote itself, this delay of three months rendered the *vote* null and void. Time was thus made material by the very terms of the vote; and to authorize the issue of the bonds, the constitution required compliance with the vote—not merely an excuse for non-compliance. The people of the town had the undoubted right to prescribe the terms upon which they would give away, or make a donation of their money. There was no authority to make the donation on other terms after the adoption of the constitution of 1870. Will the court compel the people of the town to make a gift or donation of their bonds, forbidden by the constitution, and on terms to which they never consented?

If a completion of the first division of the road, three months after the time specified, is to be treated as a substantial compliance with the conditions of the vote, (although in direct contravention of its terms,) then the court erred in not permitting the town to prove on the trial, that as respects the three miles of the track laid next east of Rock river, opposite the town of Oregon, the same was never completed in good faith to a point on (or within one half mile of) the east bank of Rock river, *opposite the town of Oregon*, as required by the vote and charter; but that there was laid only a *temporary track*, which was subsequently taken up by the railroad company, and the line of road deflected to the south so as to cross Rock river one mile south of the town of Oregon. The court below excluded evidence offered to prove this, to which the town duly excepted.

(Printed Rec. pp. 151, 152.) It was stipulated that the "town of Oregon" mentioned in the section of the charter defining the location and *termini* of the first division, was the village of Oregon, on the west bank of Rock river (Id. 115); and it thus appears that the charter required the first division of the road to commence on the east bank of the river, opposite this village or town of Oregon; and an extension of the road westward on the line authorized by the charter would necessarily have passed through, instead of a mile south of, this village or town of Oregon.

If the evidence offered had been received, it would have shown that the first division of the road, the western *terminus* of which, as defined in the charter, was a point "on the east bank of Rock river, *opposite* the town of Oregon" (Id. 3), was *never* in good faith completed to that point, or within one half mile thereof. The mere laying of a *temporary* track, three months after the permanent track was required to be laid, and using such temporary track for a short time, and then taking it up for a distance three miles eastward and deflecting the line to the south, and laying the permanent track so as to cross the river a mile south of the town of Oregon, certainly would not be regarded as a substantial compliance with the terms of the vote, independently of the question of time of performance. For the purpose of the present contention we have the right to assume that the first division of the road never was thus completed as contemplated by the vote. There was never a substantial compliance with the terms of the vote, regardless of the question of time. And a pretended compliance in the mere laying a *temporary* track three months after it was possible to comply with the vote in point of time, and which temporary track was subsequently taken up, and the permanent track laid elsewhere, could not in any point of view be regarded as a completion of the first division of the road in substantial compliance with the terms of the vote. If the terms of the vote respecting the time of performance were to be disregarded, and the result was to depend on what the court conceived to be

the substantial equities of the parties, then we insist the matters affecting the equities of the case on both sides should have been considered, and the excluded evidence should have been received. But as we have seen, the vote, by its own terms, unless complied with on or before January 1, 1871, *never* could be complied with; and under §12, Art. IX, of the Constitution, the bonds could only be issued in *compliance* with the vote. No power existed to issue them without compliance therewith.

The case of *Anderson County Comissioners* v. *Beal*, 113 U. S. 227, cited by counsel for defendant in error, is clearly distinguishable from the present case in all its controlling features.

(1) It appears, in that case, that under the laws of Kansas the county commissioners who issued the bonds containing the recitals, *were the same tribunal who ordered the election and whose official duty it was to canvass the votes and declare the result of the election.* (Id. 239.)

It is otherwise here. As we have shown in our argument, (page 64) the town supervisor, under the laws of Illinois, had no official duties to perform in connection with the town meeting at which the vote was taken. His official knowledge of the regularity of the proceedings at that town meeting, and the result thereof, could only be obtained from the record of the official action of other officers made in pursuance of law. It was not the *primary duty* of the supervisor and town clerk to determine anything in respect to that town meeting.

(2) In that case the bonds contained a recital, which the court construed in connection with the official record of the election, made by the county commissioners who issued the bonds, as equivalent to a statement "that the vote was lawful and regular in form, and such as the law then in force required, in respect to prior notice." (113 U. S. p. 239.) Whereas in the present case, the bonds contain no statement or recital which can be fairly construed as a declaration that the constitutional requirements had been met in any particular. (*Vide* Argument for plaintiff in error, pp. 57–62.)

(3) In that case the court held "that if there was in fact "any want of proper notice of the election, the omission "was *only an irregularity* in the exercise of an express power "to issue the bonds, an irregularity in respect to a step "forming part of the preliminary conditions, and that the "failure of the municipality and of the taxpayers to enjoin "the issue or use of the bonds, during the long period from "the day of election, September 13, 1869, until the bonds "were registered in March, 1872, when they still belonged "to and were in the hands of the company, coupled with "the annual payment by the county, for ten years, of the "interest on the bonds, are sufficient grounds for holding "that the municipality is estopped from defending on the "ground of the alleged defective notice of the election, "after the bonds had been negotiated for value by the com-"pany."

In the present case we have shown in our argument (p. 42,) that section 12, Article IX of the State Constitution, absolutely prohibited the issue of the bonds and creation of the indebtedness in excess of the five per cent. limitation, unless the same could be done in compliance with the vote of the people of the town, had in pursuance of law prior to the adoption of the constitution.

Upon the undisputed facts in this case, as the same existed when the bonds were issued, the constitution absolutely prohibited the issue of the bonds. Under this section of the constitution the failure to comply with the vote of the people was something more than a "mere irregularity in the exercise of an express power to issue the bonds."

Upon failure to comply with the vote within the time prescribed, the power to issue the bonds and create an indebtedness in excess of the five per cent. limitation imposed by the constitution, *absolutely ceased and determined.* Thereafter the power had no existence.

This court recognizes the distinction between matters which show the non-existence of power to create the indebtedness, and mere irregularities in the exercise of existing legal authority to create such indebtedness.

In the opinion of the court in *Dixon County* v. *Field*, 111 U. S., at page 94, it is said:

"The difference in the result of the judgments have depended upon the question, whether, in the particular case under consideration, a fair construction of the law authorized the officers issuing the bonds to ascertain, determine and certify the existence of the facts upon which their power, by the terms of the law, was made to depend; not including, of course, that class of cases in which the controversy related, not to *conditions precedent, on which the right to act at all depended*, but upon conditions affecting only the mode of exercising a power admitted to have come into being."

Moreover, the bonds in this case appear to have been secretly signed and issued "between two days," by one of the directors of the railroad company, assuming to act as supervisor of the town under a colorable and fraudulent appointment which the managing officers of the railroad company procured to be made for that purpose; and it does not appear that there was a delay of the town and its taxpayers for nearly three years, *while the bonds were held by the company*, to raise the objection of their fraudulent issue. The record shows that a bill was filed for that purpose by the taxpayers, immediately after they discovered the fraudulent issue of the bonds. (Print. Rec. pp. 101, 151.) The only excuse counsel for defendant makes in his argument (p. 8) for hurriedly appointing Potter and issuing the bonds on the night of April 3d, is that "some parties were liable to enjoin the issue of the bonds before a supervisor could be elected the next day!" There is clearly nothing in this case upon which to predicate an equitable estoppel against the town.

There are a few other questions relating to the defense interposed by the second plea to which the argument of counsel for defendant in error invites a reply.

1. It is contended at page 11, thus:

"As the bonds and coupons are payable in New York, the Illinois statute with reference to fraud and circumvention has no application."

The fact that the bonds and coupons were made payable in New York does not obviate the statutory defense set up in the second plea. The defendant is a municipal corpora-

tion, deriving all its powers from the laws of the State of Illinois. It is, indeed, a subordinate agency through which the State government is, in part, carried on. It can incur no liabilities to be discharged by taxes collected from the people, except so far as authorized by the laws of that State. Indeed, the laws of Illinois enter into and form a part of all its contracts, and limit its capacity to make contracts, whether the same are to be performed within the State or out of it. It can not migrate like a natural person; nor has it as full power to make contracts as a natural person. Everything it does, it must do under and with reference to the laws of Illinois.

The authorities holding that contracts made in one State, may be made with reference to the laws of another State, and be governed thereby, are based upon the assumption that by so doing the contracting parties adopt the laws of such other State to govern the contract, instead of those prevailing at the place where the contract is actually made.

*Strawbridge* v. *Robinson*, 5 Gilm., 470–472.
*Robinson* v. *Bland*, 2 Burr. 1077.

It would be little less than absurd to hold that a township existing under the laws of Illinois, could by its contract absolve itself from the controlling effect of those laws, and adopt in lieu thereof those prevailing in some other State or country.

Should we concede, however, that a municipal corporation of this character had as ample power to adopt the laws of another State as a natural person, the same would not show that the laws of Illinois, prevailing where the contract was actually made, did not govern the same, so far as relates to the obligation, interpretation, and validity of the contract.

After an elaborate review of the authorities, this question is summed up by this court thus:

"Matters bearing upon the execution, the interpretation and the validity of a contract are determined by the law of the place where the contract is made.

"Matters connected with its performance are regulated by the law prevailing at the place of performance.

"Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitations, depend upon the law of the place where the suit is brought.

"A careful examination of the well considered decisions of this country and of England, will sustain these positions."

*Scudder* v. *Union Nat. Bank*, 91 U. S. 406–413.

The defense set up by the second plea goes to the validity of the contract, and rests upon the law of Illinois, where the contract was made.

In the case of *Buchanan* v. *Litchfield*, 102 U. S. 278, the bonds of the city of Litchfield were, on their face, made payable at the Nassau Bank, in the city of New York, yet their validity in the hands of a *bona fide* holder was determined by the constitution and laws of the State whose municipal corporation issued the same.

So also as to the bonds involved in the case of *Dixon County* v. *Field*, 111 U. S. 83.

If it were not so held, the municipal corporations of each State could exercise powers permitted by the constitution and laws of any State where they elect to make their bonds payable, but the exercise of which is prohibited by the constitution and laws of the State where such municipal corporations exist.

The authorities last cited are directly in point as to the defense made by the third plea; and we submit that the same principle is applicable to the defense made by the second plea.

2. Inasmuch as the recitals contained in the Oregon bonds do not show a compliance with the constitutional requirements, nor that the bonds were issued in compliance with a vote of the people of the town, taken in pursuance of law providing therefor, prior to the adoption of the constitution in 1870, the question is of no practical importance in the present case, whether or not the supervisor and town clerk in office in 1871, had power to make recitals upon

these matters, in the bonds in question, which would estop the town from showing the truth in its defense.

We have expressed what we desire to say on this question in our argument at pages 62–66, and will here simply reply to the point made by the counsel for defendant in error, that we are concluded upon this question, by the decisions of this court, in township bond cases coming here from Illinois.

We are aware that in two or three such cases coming to this court from Illinois, it has been held that the recitals contained in the bonds then before the court estopped the town from making the particular defense sought to be made in those cases.

(1) In none of those cases was the fact made to appear that the indebtedness sought to be created exceeded the five per cent. limitation imposed by Sec. 12, Art. IX, of the Constitution; and no question was thus raised as to the absolute want of power to issue the bonds. The defenses raised in those cases belong to the class of cases where the defense rests upon mere irregularities in the exercise of an existing power to issue the bonds, and not upon facts, showing an entire want of power to create the indebtedness. In this respect the cases referred to are distinguished from the present.

(2) In none of the cases, where the recitals made in township bonds, signed by the supervisor and town clerk, have been held to estop the town from showing that the election was not held in conformity with law, etc., does it appear that the question has been raised in the briefs of counsel or considered by the court *as to whether under the laws of Illinois it was the primary duty of the supervisor and town clerk* to pass upon and decide the question which formed the subject-matter of the supposed estoppel. This fundamental question was generally taken for granted. The case of *Town of Coloma* v. *Eaves*, 92 U. S. 484, turned upon the construction which the court gave the railroad charter in that case. After an examination of the provisions of the railroad charter authorizing the elec-

tion to be held to vote upon the question of subscription to the stock, the court construed the charter as authorizing either the supervisor or town clerk "*to conduct the election and to determine what the voters have decided.*" (Id. p. 488). In that case the court make no reference to the general statutes, or laws of Illinois upon the subject of elections or town meetings. It was treated as if the provisions of the railroad charter then before the court, in and of themselves, made complete provision for holding and conducting the election, canvassing the vote and declaring the result thereof. There does not appear to have been anything in that railroad charter in any wise referring to the general laws of the State upon these matters, or requiring their provisions to control in the conduct of the election. It is otherwise in the present case. As we have shown in our argument at page 53, the charter of the Ogle and Carroll County Railroad Company, authorizing the election to be held to vote upon the question of the donation, expressly provided thus: "And such election shall be *held and conducted*, and return thereof made, *as is provided by law.*" This language of the charter clearly indicated that the election was to be held and conducted in conformity to the general laws of the State, in all particulars where the charter made no provision to the contrary. There was no reason for holding that it was contemplated, that either the supervisor or town clerk, was to preside at the election, as was held in the case of *Town of Coloma* v. *Eaves*. It was not, therefore, the *primary duty* of either the supervisor or town clerk to determine anything in the present case, in respect to the regularity or result of the election. And in all of the well-considered cases this court has uniformly held that recitals made in municipal bonds by public officers, will only estop the municipality from proving the truth in its defense, when such recitals are made by the officer or tribunal whose primary duty it is, under the law, to decide the matter involved; and that the recitals are conclusive, simply because they contain the decision of the matter by the very tribunal appointed by law to determine the same, not

simply to govern their own action, but for "authentic and final information on the subject." (See authorities cited in argument at pages 62, 63.)

It can not be held that the supervisor or town clerk had power to make recitals in the bonds which would estop the town of Oregon upon the matters here involved, consistently with the principles established by the decisions of this court upon that question.

3. It is contended that the town is estopped from contending that Potter was not a *de facto* or acting supervisor by the charge of Judge Blodgett in the Wallace suit. We do not concede that the charge of a trial court upon a question of law in one case will preclude the parties from contending that the law is otherwise in another suit upon a different cause of action, but assuming this to be so, such ruling is not inconsistent with the defenses made in the present suit. It is clearly not inconsistent with the defense made under the third and fourth pleas that Potter should have been *de jure* as well as *de facto* supervisor. And the defense made by the second plea, that the execution of the bonds and coupons was obtained by fraud and circumvention, presupposes that the bonds were so signed as to be *prima facie* the obligations of the town. The contention that the "making and executing" of the bonds was obtained by fraud and circumvention, implies that the bonds were made and executed, in behalf of the town, by some one having at least apparent authority to sign the same as supervisor. The gist of the defense is that such "making and executing" was obtained by fraud. We do not question that, except for the fraud, Potter had sufficient color of authority as acting or *de facto* supervisor, to render his acts as supervisor valid in favor of third persons dealing with him in good faith. The railroad company, through its attorney, president and directors, conspired with Potter, who was one of their number, to practice the fraud. They did not act in good faith. As to the railroad company, the act of signing the bonds was fraudulent and void. It was but the consumma-

tion, and a part of their fraudulent conspiracy, to give him such color of authority, to the end that he might sign the bonds.

As we have shown in our argument (pp. 36, 37) the fraud was practiced to obtain the "making and executing" of the bonds. The Illinois statute under which the second plea was framed authorized that defense to be pleaded against a *bona fide* assignee (Id. 34); and as against such assignee for value, such defense can only be made by special plea. (Id. 35.) And inasmuch as no such special plea was filed in the Wallace suit, the defense now made under the second plea in this suit, was not and could not have been actually litigated in that case. (Printed Rec. p. 156.) Under the pleadings in that case it was a sufficient answer to the evidence showing fraud to show that the plaintiff represented one who had purchased the bonds for value without notice, etc. The court appears to have so ruled in that case. (Id. pp. 119, 121, 156.) It is otherwise under the Illinois statute where this defense is especially pleaded.

4. Upon the question as to whether one of the two justices of the peace of the town, could, without the presence or concurrence of the other, make a valid appointment of a supervisor, the law as it then existed in Illinois under the statutes of that State, as construed by its courts, should govern, and should be given a preference to that of any other State. Every official act performed by the public officers of the town of Oregon rests for its validity upon the laws of that State. In *Louk* v. *Woods*, 15 Ill. 256, the rule in that State is thus stated in the syllabus:

"Where a number of persons are intrusted with powers in matter of public concern, and all of them are regularly assembled and consulting, the majority may act and determine, if their authority is not otherwise limited and restricted.

"In such case where a report is only signed by two of three viewers of a road, it will be presumed that the third was present and consulting, *until the contrary is shown.*"

This is in accordance with authorities cited on p. 39 of our argument.

An examination of *Cooley* v. *O'Connor*, 12 Wall. 398, cited by counsel for defendant as holding a different rule, will show that it is not in conflict with these authorities. It is there said: "In one of the cases cited in the note it was held that two of the three trustees of a school district might issue a warrant for the collection of a tax, *and that the presence of the third trustee would be presumed until the contrary was shown.*" This, as we have seen, is the Illinois rule. In the present case the absence of Schultz, the other justice of the peace, was affirmatively shown by the testimony of Marsh, the town clerk. (Printed Rec. p. 146.)

5. It is contended by counsel for defendant in error (p. 22) that the 9th clause of § 1, Chap. 131, of the Revised Statute of Illinois, passed in 1874, should be construed to operate retrospectively so as to validate acts which were invalid when they transpired. Even if the legislature had power to make such an act retrospective upon a question of this character so as to defeat a valid and subsisting defense, it is sufficient to say that it is plain that no such attempt was made in the present instance. There is nothing in the act to indicate that it was designed to affect past transactions or operate retrospectively, and to give the statute such retrospective effect would be inconsistent with sections 4 and 6 of the same chapter. (See Rev. Stat. of Ill. Chap. 131, §§ 4 and 6.)

6. It is also contended that the sections of the constitution of Illinois, cited in our argument at page 38, which continue a justice of the peace in office "until his successor is elected and qualified" should be limited to cases where some creditor of the town desires to obtain service of process upon him, or to compel him to perform some official act to aid in the enforcement of his demands.

It is a sufficient reply to this contention that the constitution does not so provide. The provision was inserted for the general benefit of the public, and especially for the benefit of the people and taxpayers of the town in whose behalf

he is authorized to perform certain official duties, in which they may be vitally interested. No more important power is vested in such justices of the peace, than the power to appoint a supervisor of the town, who may exercise the powers of that office, and thereby impose heavy pecuniary responsibilities upon the taxpayers.

7. Counsel for defendant in error insists that the fact that Potter's appointment, official oath and bond were dated back to Dec. 31, 1870, and that the appointment was made and bonds signed in the "evening" immediately before the town meeting when a supervisor was to be elected, were not evidence of any fraudulent intent. Add to this the fact that Potter and the other directors and officers of the railroad company well knew that they were not entitled to the bonds and could not lawfully obtain them, and that (as is now admitted) they feared that if they delayed their issue until a supervisor could be elected the next day, "some parties were liable to enjoin the issue of the bonds," etc.; also the fact of Potter's pretended appointment as supervisor and his signing the bonds, being concealed from the public at the town meeting held the next day, and for several weeks thereafter; and that although it was the duty of the supervisor to report his official action to the annual town meeting, yet he not only failed to do this, but permitted the people there assembled to act in ignorance of the fact that he had signed the bonds, or even claimed to be supervisor of the town; and add to all this the criminating fact, that in order to make it falsely appear that he had been acting as supervisor prior to April 3, 1871, and to thus give him greater apparent authority to sign the bonds in behalf of the town, he perpetrated a forgery upon the town records and made a false entry therein, indicating that he was present at the meeting of the board of town auditors held March 28, 1871, acting in the capacity of supervisor of the town. Falsely altering a record of a public nature, is forgery under the statutes of Illinois. Here was both forgery and falsehood perpetrated to give Potter, the director of the railroad company, apparent authority, as supervisor, to sign the bonds.

All this was done as a part of the transaction in and by which the bonds were signed. Was not this sufficient evidence of fraud or circumvention to submit to a jury?

8. It is said the people elected a supervisor the next day who was willing to sign the bonds in case it should be decided that the railroad company was entitled to them. So they did, but not otherwise. Is that a reason why the railroad company should be permitted to practice fraud and circumvention to obtain the making and execution of the bonds, when it was not entitled to the bonds, and could not lawfully obtain them?

9. Counsel for defendant in error says there "was no dispute about the facts" and insists that the court properly took the case from the jury, and directed them to find a verdict for the plaintiff below.

If it is conceded that the evidence showed that the "making and executing" of the bonds and coupons in question was obtained by fraud and circumvention as alleged in the second plea, then we agree that as to the defense made under that plea there was no dispute about the facts. It is certain that the evidence strongly tended to prove the fraud as alleged in that plea, the substance of which is summarized in our argument at pages 35–37.

The stipulation of the parties states and admits facts which show that at the time the bonds were issued the town was already indebted in an amount exceeding the five per cent. limitation imposed by § 12, Art. IX, of the Constitution; and if it is conceded that the evidence shows that the bonds and coupons were *not* issued "in compliance" with the vote of the people, had prior to the adoption of the constitution as required by the saving clause to that section, then there is no dispute about the facts averred in the third plea, and therein relied upon as a defense.

As to the defense set up in the fourth plea, there was clearly no disputed question of fact; and if it is conceded that the defenses set up in these special pleas were *not actually litigated* in the Wallace suit, then there is no disputed question

of fact arising under the replications to said pleas. The witness Dutcher, so testified. (Print. Rec. pp. 155–156.)

With these concessions we insist the Circuit Court ought to have directed the jury to find a verdict for the defendant in that court, and not for the plaintiff therein.

If these concessions are not made, then we insist that the Circuit Court ought to have submitted these questions of fact to the jury, instead of taking the case from their consideration, and directing them to find a verdict for the plaintiff. The evidence was sufficient to sustain the contention of the defendant below, upon each of these questions of fact.

If the defense made under either of the special pleas is held to be sufficient, the judgment of the court below is erroneous, and ought to be reversed.

JAMES K. EDSALL,

*For Plaintiff in Error.*

119-74

IN THE

# SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1886.

TOWN OF OREGON,
*Plaintiff in Error,*
*vs.*
ELIZA JENNINGS,
*Defendant in Error.*

*Error to Circuit Court, U. S., for Northern District of Illinois.*

## Brief and Argument for Defendant in Error.

S. W. PACKARD,
*For Defendant in Error.*

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1886.

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## Brief and Argument for Defendant in Error.

AS TO THE DEFENSE MADE BY THE AMENDED SECOND PLEA.

This defense is based on Sec. 11 of the chapter on "Negotiable Instruments" in the Revised Statutes of Illinois.

It is claimed that the bonds in question were fraudulently issued, and that this fraud renders the bonds null and void even in the hands of a *bona fide* purchaser for value before maturity.

We insist that this defense can not be sustained for several reasons:

1. *This statute is simply the declaration of the common law on this subject, and does not embrace cases of this character.*

"Fraud in the execution of the instrument has always been admitted in a court of law, as where it has been misread or some other fraud or imposition has been practiced upon the party in procuring his signature and seal. The fraud in this respect goes to the question whether or not the instrument ever had any legal existence."

*Per Justice Nelson* in delivering the opinion of this court in *Hartshorn* v. *Day*, 19 How. 241, 245–6.

To the same effect see 1 Daniel on Negotiable Instruments, 3d Ed., chapter 26, especially sections 850 to 853, inclusive, where the author shows that many courts, under the sole authority of the common law, have gone further in holding negotiable instruments void in the hands of innocent assignees on account of fraud practiced in the obtaining of the same than the Illinois courts have under the authority of this statute.

If the officers of the railroad company had by false representations as to the amount, nature or character of these bonds, induced the officers of the town to sign and deliver them, that would be a fraud perpetrated by the payee of the instruments upon the parties executing them of the character contemplated by the framers of this section (provided the law includes bank notes and municipal bonds).

If, for example, the officers of the railroad company had by some trick or device induced the township officers to believe that they were only signing some receipts or certified copies of records, or something else than bonds, and the township officers had not been guilty of any want of proper caution and prudence in the matter, then the town would not be liable *because the minds of these officers did not accompany their acts.* They never intended in such a case to issue bonds, and hence the bonds in such a case would not be the bonds of the town. They would be in effect *forged securities.*

The Supreme Court of Illinois has repeatedly construed this statute, and has held over and over again that the emphasis in the statute should not be put upon the word "*any*" as the learned counsel for the town contends, but upon the words "*fraud or circumvention,*" which had, when used in that connection, a well known meaning at common law at the time this statute was adopted. Look at the difference in the meaning of the two renderings.

"If *any* fraud or circumvention be used in obtaining the

making or executing of any of the instruments aforesaid, such fraud or circumvention may be pleaded," etc., etc.

"If any *fraud or circumvention* be used in obtaining the making or executing of any of the instruments aforesaid, such *fraud or circumvention* may be pleaded," etc., etc.

Although this statute makes no exception of cases where the maker has neglected to use "*due diligence*" to prevent the fraud or circumvention from being perpetrated upon him, yet the common law does when the defense is set up against the note in the hands of an innocent assignee. Hence the Supreme Court of Illinois introduces that limitation upon the operation of that word "any" in this statute. See *Leach* v. *Nichols*, 55 Ill. 273, 276–279, where, upon the authority of the case of *Foster* v. *McKinnon*, 38 Law Journal, New Series, p. 310, and *Putnam* v. *Sullivan*, 4 Mass. 45 (Common Law Cases), the court held that the maker of the note must have exercised *due diligence* or he can not avail himself of this statute.

This rule has been followed in numerous other cases. See *Swannell* v. *Watson*, 71 Ill. 456.

*Homes* v. *Hale*, 71 Ill. 552.

*Sims* v. *Bice*, 67 Ill. 88.

*Mead* v. *Munson*, 60 Ill. 49.

*Anderson* v. *Warne*, 71 Ill. 20.

In *Anderson* v. *Warne* McAllister, J., says:

"Any instrument obtained by fraud and circumvention in the execution, without negligence on the part of the maker of it, is void at common law, whenever or howsoever the question may arise, and I think our statute subjects negotiable instruments to the same rule." 71 Ill., p. 23.

The Illinois Supreme Court has had occasion many times to construe this statute.

But in all of these decisions the court has given the words "*fraud or circumvention*" no more enlarged meaning than the same words have at common law when applied to the obtaining of the execution of an instrument.

In *Elliott* v. *Levings*, 54 Ill. on p. 214, the court, in construing this section say:

"The plea in this case is not good as against the assignee of the note before maturity for a valuable consideration. It does not show fraud and circumvention in obtaining the execution of the note, *as those words in our statute have been construed by former decisions of this court.*

"It does not aver *that the defendant did not know he was signing a promissory note*, but merely shows that by the terms of an instrument attached to the note when it was executed, it was only to be paid on a contingency which did not occur, and that this instrument was wrongfully detached from the note after its execution."

There is no pretense in this case that the officers of the town who executed the bonds did *not know* what they were signing or that they *did not intend* to sign the bonds in question.

In order to come within the provisions of this statute as construed by the Illinois Supreme Court, or within the common law rule, that must be shown when the defense is set up against an innocent assignee.

In *Lotham* v. *Smith*, 45 Ill. 27, the court again say in construing this statute:

"A fraud in obtaining a note may consist of any artifice practiced upon a person to induce him to execute it *when he did not intend to do such an act.* Circumvention seems to be nearly if not quite synonymous with fraud. It is any fraud whereby a person is induced by deceit to make a deed or other instrument. It must be borne in mind that the fraud or covin must relate to the obtension of the instrument itself and not to the consideration upon which it is based. It is not fraud which relates to the quality, quantity, value, or character of the consideration upon which it is based, *but it is such a trick or device as induces the giving of one character of instrument under the belief that it is another of a different character; such as giving a note or other agreement for one sum or thing when it is for another sum or thing; or as giving a note under the belief that it is a receipt.*"

In *Shipley* v. *Carroll*, 45 Ill., on p. 287, the court again say:

"Under this section of our statute it has been repeatedly held that the fraud must relate to the execution of the instrument itself and not to the consideration; *that a false representation as to the amount, or other terms of the instrument, or of its nature and character, was what was intended to be embraced.*"

The very language of the section seems to exclude the idea that it was intended to embrace cases *of fraud committed by the party* making or executing the instrument, as the last clause refers to the "party committing the fraud or circumvention," as the payee of the instrument.

"It is well settled that the only fraud permissible to be proved at (common) law in these cases is fraud touching the execution of the instrument; such as misreading, the surreptitious substitution of one paper for another, or obtaining by some other trick or device an instrument which the party did not intend to give."

Per Justice Swayne in *George* v. *Tate*, 101 U. S., on p. 570. (See also cases there cited.)

In *Maxcy* v. *Williamson County*, 72 Ill. 208, a municipal bond case, the Illinois Supreme Court decided as follows. We quote from the syllabus of the case:

"*Fraud—As against bona fide holders.*—Where there is fraud in obtaining the issuing of bonds before the completion of a railroad to a given point, when by the terms of the agreement they were not to be issued until the completion to that point, such fraud does not affect the consideration of the bonds or their validity in the hands of *bona fide* holders."

At common law a plea of fraud in the making and issuing of municipal bonds is no defense against an innocent purchaser unless the fraud is of that character described in the Illinois decisions above referred to construing the statute in question.

In other words the fraud must be of such a character as to amount practically to a forgery—the obtaining of an instrument which the officers never intended to execute.

Any fraud short of that is no defense when the suit is

brought by a *bona fide purchaser* for value before maturity.

*Kennicott* v. *The Supervisors*, 16 Wall. 464–465.
*Town of East Lincoln* v. *Davenport*, 94 U. S. 801.
*Cromwell* v. *Sac County*, 96 U. S. 51.
*County of Macon* v. *Shores*, 97 U. S. on page 277.
*Brooklyn* v. *Insurance Company*, 99 U. S. 370.

In the case last cited Mr. Justice Harlan, in delivering the opinion, said:

"By the act of the town's constituted authorities, who, by the statute, had the right, under certain circumstances, to execute and deliver the bonds and coupons, the railroad company was enabled to put them upon the money market in advance of the construction of the road. It is now too late for the town to claim exemption as against *bona fide* purchasers, upon the ground that its own officers delivered the bonds in violation of special conditions of which the purchasers had no knowledge or notice either from the statute or otherwise. The remedy of the city is against the railroad company and its own unfaithful officers who, it is alleged, *were in fraudulent combination with the company*."

In connection with this cry of *fraud* by the town, it is proper to notice some of the undisputed facts of the case.

First, the inhabitants of the town were very anxious to get this railroad built, which up to the time of the trial in the court below furnished them their only railroad communication with the outer world.

The town had been trying for some time to get this road built before it was accomplished.

The record (side page 212) shows that on the 24th of May, 1869, the town voted to donate $50,000 in bonds to this road if it should be built by January 1, 1870.

But that did not bring the railroad, and so on the 9th of December, 1869, the town voted to donate $10,000 of the amount to help the road along (Rec. side pages 180, and 109–110, and 91), and on June 23, 1870, the balance of the

$50,000 was voted, but not to be delivered until the road was completed to within one half mile of the east bank of Rock river, which was required to be done by January 1, 1871. (Rec. side pages 180–184.)

The railroad was not completed from Rochelle (where the first division started west) to within one half mile of the east bank of Rock river, until April 1, 1871. (Rec. side pages 142, 162 and 280.)

The only reason which this record shows why it was not completed on time was because of a delay occasioned by "the tearing up of the frog of the connection with the North Western road" at Rochelle the eastern starting point of the road, which stopped, for the time being, the laying of the iron. (Rec. side pages 142, 143, 162.)

The voters of the town evidently believed that the railroad company ought to have the bonds if they could be legally issued—as the record shows that on 4th day of April, 1871, three days after the road was completed, Mr. Dwight was elected supervisor of the town on that issue. William J. Mix, the present supervisor, testified:

"The question of the election of the supervisor that day hinged upon the issuing of the bonds." * * "There was a feeling on the part of the citizens that the bonds of the town ought not to be issued to the railroad company, and that they should not be, until the authorities of the town were satisfied that they were legally held for the bonds *or that they could be legally issued. There was no disposition to go back of the issuing of the bonds if they could be legally issued or they were legally held for them.*" (Rec. side p. 278, 279.)

Mr. Waggoner ran as a candidate representing that general feeling of the town and Mr. Dwight, in the early part of the day, ran on the supposition among some of the citizens that he was "for issuing the bonds any way, whether right or wrong." (Rec. side p. 279.)

Subsequently in the day it became known that Mr. Dwight proposed to "take competent counsel," before issuing the

bonds, and was not for issuing them unless it could be done legally, and he was elected. (Rec. side pages 155–158 and 279.)

The reason that Dr. Potter was appointed supervisor the evening before this election and the bonds executed then, was because it was rumored that some parties were liable to enjoin the issue of the bonds before a supervisor could be elected the next day to fill the vacancy, and that would cause litigation. (Rec. side page 275.)

The fact that the meeting at which Dr. Potter was appointed was held in the evening did not make the proceeding fraudulent. The meeting was held in the office of the justice of the peace where such meetings were usually held (Record side p. 268) and it was no unusual thing for such meetings to be held in the evening. (See Rec. side p. 268.)

The meeting at which Dr. Potter was appointed took place on the evening of April 3, 1871. The bonds were all lithographed, including the date, "thirty-first day of December, A. D. 1870." (See Record side page 92.)

It was necessary to date the appointment back to Dec. 31, 1870, in order to make the record correspond with the lithographed date in the bond.

There was no fraud in that. M. W. Smith, the preceding supervisor, had in fact handed in his resignation Dec. 30, 1870, (see Record side pages 190 and 127), just before he went to take his seat in the State legislature.

*The bonds would have been no better—no worse—if they had been issued under date of April 3, 1871, and the record had shown the exact date of the transaction.* The record was not dated back to accomplish any fraudulent purpose, but simply as a matter of convenience.

The people of the town did not consider that these men who attended that meeting and participated in the proceedings, were engaged in any fraudulent conspiracy to defraud the town, or else they would not subsequently have elected them to offices of trust and honor.

Fred. H. Marsh, the town clerk, who, with J. H. Cartwright, the justice of the peace, made the appointment of Dr. Potter and who signed the bonds with Potter, was subsequently twice elected to the legislature, once elected sheriff, and is now the U. S. Marshal for the Northern District of Illinois. (Rec. side page 67.)

J. H. Cartwright was elected justice, April 5, 1870, (Rec. side page 89) and yet on the trial, Nov. 6, 1874 (Rec. side pages 103 and 214), we find him still a justice of the peace (Rec. side page 120), and on the last trial, in November, 1884, we find him master in chancery.

F. G. Petrie, who was the surety for Dr. Potter on his bond as supervisor and therefore must have been privy to the transaction, was subsequently elected county judge. (Rec. side page 143.)

Probably if Dr. Potter had not died (Record side p. 268) he would have been honored with some office, too.

There was no fraud intended, and the people of the town well understood it. But, like many another community, they would like to escape from the payment of the bonds if there is any possible way to do it.

The only possible ground for claiming that there was anything wrong or fraudulent in the issuing of the bonds arises solely from the fact that there was a delay of three months in completing the railroad beyond the 1st of January, 1871.

In the case of *People* v. *Holden*, 82 Ill. 93, the Illinois Supreme Court, in speaking of a defense based upon a delay of ten months in completing a railroad according to contract beyond the time stipulated in the vote, say, page 103:

"The road is completed from one terminus in Paris, Edgar county, to the city of Danville, in the township of Danville, and is answering all the demands and wants of the public, and there is no reason or justice in permitting the township to escape its liabilities. *Even if the road had not been completed within the time, in the absence of any fault on the part of the defendants (the town officers) still it would be received if it was completed and equipped and in successful operation as this*

*road is. Such a plea ought not to avail in a court where justice is supposed to be administered.* The town has obtained all it expected to obtain and ought to pay what it agreed to pay. of the defendants or those they represent have sustained damages by the delay, they might be entitled to recover from the company to the extent of those damages. This would be more in accordance with justice than the demand they set up, that they shall go 'Scot free' although the road has been made for them as contemplated."

In the Wallace case, where the evidence on this branch of the case was the same as on the last trial, Judge Blodgett said in charging the jury (this was proved in support of the plea of *res adjudicata*):

" *Time is not held as a general rule in law to be the essence of a contract, unless expressly made so, and it is always waivable.* A party can very readily say: 'Well, although you have not fulfilled your contract expressly in regard to time, yet that does not essentially vary the terms of the contract itself, and you have substantially fulfilled it, and therefore you are entitled to your compensation and we give you your bonds,' although the railroad may not be in fact completed on the day it was named." (Record side p. 208.)

In *County of Randolph* v. *Post*, 93 U. S. 513, 514, this court say in reference to a similar defense based upon the non-completion of the road on time :

"We should unreasonably restrict the rights and powers of a municipal corporation were we to hold that it did not possess the power to alter its legally made contract *by waiving conditions found to be injurious to its interests, or that it could not estop itself like other parties to a contract.*"

In this case there was no evidence to show that the town had not been guilty of such conduct as would equitably estop it from setting up as a defense against issuing the bonds that the road was not completed by the time stipulated in the vote. We refer to this point more fully hereafter; see *post*, pages 53–57.

We submit, therefore, that proof of the mere fact that the road was not completed until three months after the time stipulated, does not furnish sufficient ground for the charge

that the execution of the bonds was procured by "fraud or circumvention," even if the 11th section of the act on Negotiable Instruments was intended to apply to a case where the alleged fraud was perpetrated, *not upon, but by* the party executing the instrument.

2. *As the bonds and coupons are payable in New York, the Illinois Statute, with reference to fraud and circumvention, has no application.*

(*a*) The act under which these bonds were issued did not forbid the bonds or coupons being made payable in another State. When such is the case the municipality can legally make the bonds and coupons payable in another State.

*Calhoun County* v. *Galbraith*, 99 U. S. 218.
*Meyer* v. *City of Muscatine*, 1 Wall. 391.
*Lynde* v. *The County*, 16 Wall. 13.
*Pana* v. *Bowler*, 107 U. S. on p. 546.

In *Meyer* v. *The City of Muscatine*, 1 Wall. 391, this court said in deciding this point:

"It was according to the general usage to make such bonds and coupons payable in the city of New York. It added to the value of the bonds and was beneficial to all parties. No legal principle forbids it. The power of a municipal corporation to make any contract does not depend upon the place of performance but upon its scope and object. A city authorized to establish gas works and water works and to gravel its streets, may buy water, coal and gravel beyond its limits and agree to pay where they are found or elsewhere. The principal power when expressed draws to it by necessary implication the means of its execution."

(*b*) And where municipal bonds are so made payable in another State the rate of interest of such State controls after maturity, unless the rate of interest fixed by the bonds is so high as to make the bonds void for usury in the State where payable.

*Gelpcke* v. *Dubuque*, 1 Wall. 176, 178, 206.
*Pana* v. *Bowler*, 107 U. S., on page 546. (An Ill. Township Bond case.)

(c) Statutory enactments authorizing certain defenses to be made against an innocent assignee of negotiable paper have no application to negotiable paper which is made payable in another State—although it may have been actually made and signed, and the suit for its enforcement brought in the State where such statute rule prevails.

*Brabston* v. *Gibson*, 9 How. 263.
*Supervisors* v. *Galbraith*, 99 U. S. 218.
Story on Prom. Notes, § 165.
Wharton on Conflict of Laws, §§ 462, 451.

Upon the general doctrine that the law of the place of payment governs in like cases, see the late case of *Pritchard* v. *Norton*, 106 U. S. 124.

In the case in 9th How. above cited, the note was made in Louisiana, but payable in Mississippi, and suit was brought on it in Louisiana by an indorsee. According to the statute law of Louisiana, the maker was allowed the benefit of all want of lawful consideration, payments, set-offs, etc., made, had or possessed against the same, previous to notice of the assignment. This court held that the statute could not be invoked, saying (p. 277):

"The law of the place where a contract is to be performed, and not the place where it was executed, applies."

That authority is exactly in point in this case.

The case in 99 U. S. above cited was a municipal bond case, in which this court in passing upon this point said:

"No place of payment of the bonds being designated by the statute it was competent for the supervisors to make them payable in New York. *The law of the place of performance governed the construction and effect of the contract.*"

3—SECTION 11, OF THE CHAPTER ON "NEGOTIABLE INSTRUMENTS," WAS NOT INTENDED TO INCLUDE BANK BILLS OR MUNICIPAL BONDS.

We submit that section 11 was never intended to be any wider in its scope than sections 3 and 4 of the same

chapter, which refer to the manner and effect of the assignment or transfer of "all promissory notes, bonds, due bills and other instruments in writing, made or to be made by any person or persons, body politic or corporate, whereby such person or persons promise or agree to pay any sum of money or article of personal property," etc. These two sections have been expressly held not to embrace bank notes or municipal bonds.

*Roberts* v. *Bolles*, 101 U. S. 121, 122.

Followed in

*Ottawa* v. *National Bank*, 105 U. S. 344.

4—POTTER WAS A *de jure* AS WELL AS *de facto* SUPERVISOR.

(*a*) It is claimed by the learned counsel for the town, that Elias S. Potter was not legally appointed supervisor because William Schultz did not participate in his appointment as one of the town justices of the peace.

The town of Oregon was allowed by law two justices of the peace and two only. (Record side page 273.)

These two justices and the town supervisor and town clerk constituted the appointing board of the town, which was authorized by law to fill all vacancies in town offices, except in cases of vacancy in the office of justice of the peace, which could only be filled by an election on due notice. The statutory provisions, in relation to filling vacancies in town offices in force at the time this transaction took place, were as follows:

ART. VII. FILLING VACANCIES IN TOWN OFFICES.

"SECTION 1. *Vacancy filled by appointment.*] Whenever "any town shall fail to elect the proper number of town "officers, to which such town may be entitled by law, or "when any persons elected to any town office shall fail to "qualify as such, or whenever any vacancy shall happen "in any town office from death, resignation, removal from "the town, or other cause, it shall be lawful for the justices "of the peace of the town, together with the supervisor and

"town clerk, to fill the vacancy or vacancies occasioned or "occurring in consequence of either or any of the causes "above specified, by appointment by warrant, under their "hands and seals; and the persons so appointed shall hold "their respective offices during the unexpired term of the "persons in whose stead they have been appointed and "until others are chosen or appointed in their places, and "shall have the same powers, and be subject to the same "duties and penalties as if they had been duly chosen by "the electors."

Ibid., § 2. 2. VACANCY IN THE BOARD OF APPOINTMENT.] "Whenever a vacancy shall occur, from any cause, in any "or either of the offices enumerated in the foregoing section, "as composing the board of appointment for the appoint- "ment of town officers, in case of vacancy, it shall be lawful "for the remaining officers of such appointing board to fill "any vacancy or vacancies thus occurring, except in cases "of vacancy in the office of justice of the peace, which shall "be filled only by election."

Ibid. § 3. 3. WARRANT OF APPOINTMENT FILED.] When "any appointment shall be made, as provided in the two "preceding sections, the officers making the same shall "cause the warrant of appointment to be forthwith filed in "the office of the town clerk, who shall forthwith give "notice to each person appointed."

Gross' Statutes of Ills. (1869), pages 750.

Sections 9 and 10 of Art. IV of the same chapter provides, among other things, that special town meetings may be called on giving ten days notice by publication and posting notices, and that at any such special town meeting the electors may *fill vacancies* in the office of justice of the peace.

On the 30th of December, 1870, just before proceeding to Springfield to take his seat as a member elect of the Illinois legislature, M. W. Smith handed in his resignation as a supervisor of the town of Oregon and never after that acted as supervisor. (Record, side p. 127.)

He did not return from Springfield until after April 3, 1871, the day Dr. Potter was appointed his successor. (Rec. side p. 128.)

This created a "vacancy" in the office of supervisor of the town, the supervisor being one of the appointing board.

William Schultz was elected a justice of the peace of the town in April, 1870, and resigned March 2, 1871. (Record, side pages 89 and 124.)

After his resignation he refused to act as justice any longer. (Rec., side pp. 273, and 124.) Schultz' resignation was not only *tendered*, as counsel for the town say, but it was actually filed in the office of the county clerk and by him accepted as evidenced by the fact that the resignation was duly entered upon the records as the law in such cases provided. (See certified copy of such record, top page 78 of printed record.)

Sec. 16 of Chap. 59 on "Justices and Constables" in force at this time, provided as follows:

16. *Resignation.*—Resignations of the office of justice of the peace and constable shall be made to the clerk of the (county) court of the proper county who shall immediately enter the date of every such resignation in the book above provided for; which book or a certified copy of an entry in the same shall be received as evidence in all courts within this State."

Gross Statutes of Ill. (1869), page 394.

Thus two vacancies existed in the four offices composing the board of appointment on the 3d of April, 1871.

Both vacancies had occurred by "resignation," a mode expressly recognized in section 1 of the act quoted on page 13 *ante* in reference to filling vacancies, and the 2d Section expressly provides for filling all vacancies in the offices enumerated as composing the board of appointment by the appointment of "the *remaining officers of such appointing board*," except in cases of vacancies in the office of justice of the peace.

But counsel claims that the cases of

*Badger* v. *Bolles*, 93 U. S. 599, and
*People* v. *Supervisor*, 100 Ill. 332,

hold that no "vacancies" can under the Illinois constitution legally exist in such offices.

We submit that the learned counsel entirely misapprehends the scope and meaning of those decisions. They were both cases where the town was endeavoring to escape liability to creditors by claiming that there was no officer *de jure* or *de facto* on whom process could be served.

And the court in both cases very properly held that a mere resignation or *de facto* vacancy in the office was not enough. That there must be some one on whom process could be served, and that although there was a *de facto* vacancy of the office, still the officer continued *so far as the rights of creditors were concerned*, to be a *de jure* officer, subject to process until his successor qualified.

In the case in 100 Ill. the court say, on p. 336:

"The relator insists that respondent can only cease to be supervisor *where the rights of creditors are concerned*, by both the election and qualification of a successor. We are disposed to concur in this view." * * * "A resignation ends the term of office, the same as the expiration of the time of the tenure of the office does and no more effectually."

And in the 93 U. S. this court said, on page 603:

"In form the office is thereby ended, but to make it effectual it must be followed by the qualification of a successor."

And again on pages 604 and 605:

"In *People* v. *Hopson*, 1 Den. 574. and in *People* v. *Nostrand*, 46 N. Y. 382, it was said, that when a person sets up a title to property by virtue of an office, and comes into court to recover it, he must show an unquestionable right. It is not enough that he is an officer *de facto*, that he merely acts in the office; but he must be an officer *de jure*, and have a right to act. So, we think, where a person being in an office, seeks to prevent the performance of its duties to a creditor of the town, by a hasty resignation, he must see that he resigns not only *de facto* but *de jure;* that he resigns his office not only, but that a successor is appointed. An attempt to create a vacancy at a time when such action is

fatal to the creditor will not be helped out by the aid of the courts."

The "vacancy" therefore which is referred to in the first section can be created by the "resignation" of the officer, even though he is still an officer *de jure*.

The second section uses the word "vacancy" in the same sense.

It says: "Whenever a vacancy shall occur from any "cause, (*i. e.*, whenever there are not *de facto* officers for "these offices—or whenever these offices are not *actually filled* "by officers discharging the duties of their respective offices, "although there may be *de jure* officers who in law have "the *right* to act,) *in any or either of the offices* enumerated in "the foregoing section as composing the board of appoint- "ment of town officers in case of vacancy." (The "foregoing section" enumerates as such officers the *justices of the peace*, supervisor and town clerk.) "it shall be lawful for the "remaining officers of such appointing board" (*i. e.*, those who have not "resigned" or otherwise created a "vacancy," but are *de facto* as well as *de jure* officers) "to fill any va- "cancy or vacancies *thus occurring, except in cases of vacan- "cies in the office of justice of the peace*, which shall be filled "only by election."

There may be one *de facto* officer legally exercising the duties of the office, although there is another *de jure* officer at the same time legally entitled to fill the office.

*Chowning* v. *Boger*, 2 Texas Ct. App. (Civil cases) § 743.
*Diggs* v. *State*, 49 Ala. 311.
*Coryi* v. *Rhener*, 27 Minn. 292.
*Watkins* v. *Inge*, 24 Kas. 613.

There may be "vacancies" in town offices created by resignation, which under the statute authorizes the remaining officers of the appointing board to act, although at the same time the officers whose "resignations" have created the "vacancies" may still be *de jure* officers so far at least that process may be served upon them at the suit of creditors of the town, until their successors have qualified.

There is nothing inconsistent or absurd in the two positions.

In no other way can the provisions of the statute in reference to filling "vacancies" be reconciled with the requirement of the constitution as construed by the courts to the effect that some officer must always exist on whom process at the suit of creditors of the town can be served.

Certainly if there can be a *de jure* officer legally entitled to an office which is at the same time being filled by a *de facto* officer, as we have shown by the authorities cited *ante*, can be the case, then the death of such *de facto* officer would create a *de facto* "vacancy," until the office was again actually filled either by the *de jure* officer or some one else.

There would then be a *de facto* "vacancy" while there was at the same time a *de jure* officer, legally entitled to fill the office.

It seems to us very clear, when it is admitted that William Schultz had "resigned" as a justice of the peace of said town and that a "vacancy" existed in that office, as well as in the office of supervisor, by the resignation of M. W. Smith, that it was lawful for the "remaining officers," that is, for the other justice of the peace and town clerk, "to fill "any vacancy or vacancies thus occurring, except as to the "vacancy in the office of justice of the peace."

The evident policy of the law was to meet just such cases as this—where a justice of the peace and supervisor had resigned and thereby ceased to perform the duties imposed on them by law—to permit the other officers to immediately fill the vacancy occasioned by the supervisor stepping down and out of his office, so that the business interests of the town might not suffer by the delay which would be occasioned by taking any other course.

According to the theory of defendant's counsel a vacancy in the office of supervisor could only be filled by both justices of the peace of the town participating in the appointment of a successor. If one of the justices has "resigned,"

is dead, or has removed from the town, so that a "vacancy" thereby exists in his office, it is necessary to have that "*vacancy*" filled (which can only be done by election on due notice), before the "vacancy" in office of supervisor can be filled by appointment.

As the supervisor is the legal representative of the town, and the one who must make defense in any suit brought against it, if any defense is to be made, and perform other important duties as the head of the corporation, which require immediate action (see Gross Stat. 1869, p. 752 and 755, Sec. 4) it would be sometimes very embarrassing and injurious to the interests of the town if a "vacancy" in that office could not be filled without calling and holding an election.

Again, it might be said with equal force that no legal special election could be held to fill the office of a justice of the peace where one had "resigned," because he still continues to be a *de jure* officer until his successor is elected and has qualified, or else we must say that the word "vacancies" in section 10, article IV, which gives the right to hold an election at a special town meeting "to fill *vacancies* "in the office of justice of the peace," means there an office in which there is no acting or *de facto* officer (although there may be a *de jure* officer bound by law to act until his successor is qualified), and the same word means something else in section 2, article VII, where it expressly says that "whenever a vacancy shall occur *from any cause*," etc.

In 1 Dillon on Municip. Corp., § 222, the author says:

"At common law, there must be a *vacancy* in the office "existing *at the time of the election;* 'for one can not,' says "Mr. Willcock, 'be elected to a corporate office in rever- "sion.' And the same doctrine has been recognized in this "country, and a vacancy must exist before an election to "fill it can be ordered, and an election to fill an anticipated "vacancy is not valid, unless expressly ordered by the "charter or statute.

"Elections, however, in advance of the expiration of the "regular term of the incumbent of an office, are always

"provided for and held, but such cases are not elections to "vacancies within the meaning of the rule under considera- "tio

(*b*) The finding of the appointing board that a vacancy existed in the office of supervisor by the resignation of Mortimer W. Smith (who had filed his resignation with the town clerk before he took his seat as a member of the legislature) at the time they appointed Elias S. Potter, is conclusive upon that point.

*Wood* v. *Peake*, 8 Johns. 69.
*Cotton* v. *Beardsley*, 38 Barb. 51.
*People* v. *Seaman*, 5 Denio, 412.
*Green* v. *Burke*, 23 Wend. 502.

See, also, on this point, *People* v. *Lieb*, 85 Ill. 487 and 488, where the doctrine laid down by the above cases is quoted, with approval.

(*c*) Assuming, however, that we are wrong in our construction of this statute, and assuming therefore that "the remaining officers of such appointing board," in this case included Schultz, the justice of the peace, who had certainly attempted to create a "vacancy" in his office by resignation, then we have a public duty cast by law upon those *three* "*remaining officers*," viz.:

The town clerk (F. H. Marsh); the justice who had not resigned (J. H. Cartwright), and the justice who *had* (Wm. Schultz).

In such a case we submit that it was proper for a majority of these three to act, and a majority did act, namely, the town clerk and one justice. (Record side pp. 187 and 271.)

In *Cooley* v. *O'Connor*, 12 Wall., on page 398, this court laid down the law on this point as follows:

"It is true that when an authority is given jointly to several persons they must generally act jointly or their acts are invalid. This is a general rule for private agencies, though it is not universal in its application. But the rule

is othrewise when the authority is of a public nature as it was in this case. The commissioners were public agents clothed with public authority. They were created a board to perform a governmental function, and it is a familiar principle that an authority given to several for public purposes may be executed by a majority of their number."

"In public agencies an authority executed by a majority would be held obligatory and a good execution of it."

Story on Agency, 7th Ed., § 42, note 6.

*Commonwealth* v. *Canal Commissioners*, 9 Watts, 466; (See the able opinion of Gibson, Chief Justice, on pages 470 to 472, and authorities cited by him.)

*Caldwell* v. *Harrison*, 11 Ala. 756.

The case of *Anthony* v. *County of Jasper*, 101 U. S. 698, cited by opposite counsel on page 39 of his brief, does not even pretend to antagonize this proposition of law.

In that case the law required the bonds to be signed by the presiding justice and clerk of the county court, and at the time the bonds were actually issued the law also required a certificate by the auditor of State which was not obtained. The two acts were *separate and distinct* and the rule which authorizes *a majority* to act where a public duty is cast upon three or more persons could not, of course, have any application.

The expression quoted by counsel for the town from the opinion in that case must be read in the light of the case then before the court. Then it will be seen that it is in perfect harmony with the rule laid down in 12 Wall. 398, above cited.

We admit, however, that all the authorities are not harmonious on this point and that a different rule obtains in New York, first announced by the courts and then put into the statute law of the State.

See *Crocker* v. *Crane*, 21 Wend., on p. 218, and the other cases cited by counsel for the town.

But we deny that such is the law of Illinois.

In *Louk* v. *Woods* 15 Ill. 262, cited by counsel for the town, the court decided that the report of two road viewers was good, although the law provided that *three* viewers should be appointed, who should view the ground and make the report, saying, page 262:

"But although the report in this case is signed by only two of the viewers, and does not show, nor is there any evidence that the third viewer was present and consulting, yet according to the presumption held in Doughty against Hope we shall presume that he was present and consulting until the contrary is shown."

The court to be sure does cite authorities to show that if all are present and consulting a majority may decide. But that was as far as it was necessary for the court in that case to go in order to uphold the action of the majority. We can only *conjecture* but do not *know* what the court would have held in a case like the present, where it was shown that only the majority were present or were notified of the meeting. But as the law never requires a useless act, it would seem, if the action of the balance of the board would be good provided a notice had been given to Schultz, that his refusal to act (Record side p. 273) ought to dispense with the requirement of a notice to him.

We submit in conclusion that the law on this question in Illinois is settled by the following statute. Sec. 9, Chap. 131 of the Revised Statutes of Illinois—entitled "Construction of Statutes"—declares as follows:

"Words purporting to give a joint authority to three or more public officers or other persons shall be construed as giving such authority to a majority of such officers or persons."

Revised Statutes of Illinois in force July 1, 1874. Chap. 131, Sec. 9.

This declaratory statute should be construed to operate retrospectively.

*Satterlee* v. *Matthewson*, 2 Peters, 380, 411.

Such retrospective operation does not impair the obligation of any contract and is not unconstitutional.

*Anderson* v. *Town of Santa Anna*, 116 U. S. 364 (a municipal bond case).

*Town of Beloit* v. *Morgan*, 7 Wall. 619 (another municipal bond case).

5. *If Potter was not, as we claim, a* DE JURE *supervisor, still, he was at least a* DE FACTO *supervisor, and as such his acts are legal and binding so far as the rights and interests of the defendant in error, a bona fide purchaser of the bonds and a stranger to the whole proceeding, are concerned.*

The only defect in the title of Dr. Potter to the office of supervisor ever claimed by the other side is that Wm. Schultz, the resigned justice of the peace, did not have notice of, or participate in the action of the appointing board in appointing him.

But the fact remains that the balance of the appointing board did appoint Potter supervisor, and that Potter took the oath of office and filed his official bond, (Record side pages 187–189 and 271–273) and acted as supervisor. The register of officers in the county clerk's office (Record side p. 89) as well as the town records, showed him to be supervisor. (See Record side pages 187, 274 and 275.)

The auditor of the State, too, recognized him as the supervisor of the town and registered the bonds on his certificate. (Record side pages 85 and 260.)

There was nothing in the town, county or State records to warn the defendant in error or other persons purchasing the bonds that Potter was *not* the supervisor of the town, but on the contrary, the town records, the county records and the State records all showed that he was recognized by the town, county and State officials, who were best able to know, as the legal supervisor of the town.

The defendant in error and her two brothers (from whom she purchased part of the bonds which she holds), all swear that they had no notice whatever when they pur-

chased the bonds, that Potter was not the legal surpervisor of the town, but supposed of course that he was. (Record side pp. 249, 239, 229.)

Under these circumstances were not the acts of Potter as the *de facto* supervisor of the town as valid and binding, so far as the defendant in error's rights are concerned, as though he had been a *de jure* officer?

"An officer *de facto* is one who exercises an office under color of right, by virtue of some appointment or election, or of such acquiescence of the public as will authorize the presumption, at least, of a colorable appointment or election, being distinguished, on the one hand, from a mere usurper of office, and on the other from an officer *de jure*."

1 Greenleaf on Evidence, § 92, note 1, and cases there cited.
*People* v. *Lieb*, 85 Ill., on pages 488 and 489.

If one who has been improperly and illegally appointed to a town office in Illinois accepts the appointment and qualifies, that is an entry into the office, even before any actual duties of the office have been discharged, and makes him a *de facto* officer and "obligated to perform its duties when called upon."

*People* v. *Callaghan*, 83 Ill., on pages 134–135.

Municipal bonds issued by a *de facto* officer are as valid and binding when in the hands of an innocent purchaser as though the bonds had been issued by a *de jure* officer.

*County of Ralls* v. *Douglass*, 105 U. S. 728.

"It is a well settled principle that the acts of officers *de facto* are as valid and effectual, when they concern the public or the rights of third persons, as though they were officers *de jure*."

*Trumbo* v. *People*, 75 Ill. 565 and cases there cited.

The law does not make any distinction whatever between the acts of a *de facto* and a *de jure* officer, where the rights of third persons are involved.

*Whether a party dealing with a* DE FACTO *officer has or has not notice that he is not a* DE JURE *officer, makes no difference whatever.*

The acts of the *de facto* officer are just as valid and binding in the one case as the other.

Indeed a third person is bound to accept the acts of a *de facto* officer, even if he knows that he is not a *de jure* officer. The law will not permit a third person in such a collateral way to call in question the title of a *de facto* officer. That must be done by a direct proceeding.

*Trumbo* v. *People*, 75 Ill., on page 565, and cases cited.
*Town of Lewiston* v. *Proctor*, 23 Ill. 535.
*People* v. *Lieb*, 85 Ill., on page 489.

The counsel for the plaintiff in error cites on page 40 of his brief, three cases in support of his contention, that the acts of a *de facto* officer are not valid in favor of third parties who have notice of his defective title.

We submit that not one of the cases relied upon support the claim.

In *Lippincott* v. *Town of Pana*, 92 Ill. 31, the election was held void, because conducted by a moderator and town clerk, instead of being conducted as general elections are required to be conducted, which are presided over by the supervisor, assessor and collector, and two clerks.

The question of *good faith or want of good faith* on the part of the moderator and town clerk, or the voters, had nothing whatever to do with the decision of the court in holding the bonds void.

It is proper to remark here that these same identical bonds were held good by this court in *Pana* v. *Bowler*, 107 U. S. 529.

In the case of *Rhodes* v. *McDonald*, 24 Miss. 418, another of the cases relied on by opposite counsel, there is no intimation even that a third person dealing with a *de facto*

officer, would not be protected as to the acts of the officer where he had notice of the officer's defective title.

The court say:

"The rule, too well settled to be questioned, that where one comes into office by color of title, his acts performed in the discharge of the duties of such office are valid, so far as the rights of third persons who have an interest in the acts done and the public are concerned, applies to this case: *The People* v. *Collins*, 7 J. R. 549; *McNutt* v. *Lancaster*, 9 S. & M. 589; *Riddle* v. *County of Bedford*, 7 Serg. & R. 392.

* * * * * * *

But it is contended that however just the rule may be upon which the acts of an officer *de facto*, in regard to the public and to strangers, are held to be valid, a different principle applies to the party himself; and doubtless this is true, to some extent. An officer *de facto* will never be permitted to have the benefit of his own unauthorized acts; or, in other words, when they are performed for his own benefit, exclusively, they will be regarded as void."

In *People* v. *Weber*, 86 Ill. 283, the last case cited by counsel for the town on this point, the suit was brought by the *de facto* officer himself, and the court say (pages 284, 285):

"We believe the rule to be when one claims rights as an officer, by virtue of his office, he must show that he is legally entitled to act; that he is an officer *de jure* as well as *de facto*. * * The acts of a *de facto* officer are valid only so far as the rights of the public, or of third persons having an interest in such acts, are involved. But such an officer can claim nothing for himself. *The title of such officer can not be inquired into in a collateral way between third parties*, but it may be inquired into when he is suing in his own right; as, when he is suing for money had and received, to recover the fees of an officer against a wrongful intruder: *Glascock* v. *Lyons*, 20 Ind. 1.; *United States* v. *Addison*, 22 How. 174."

This very case shows, we submit, that the position of our opponent is wrong.

If for example the railroad company in this case had refused to receive the bonds tendered them by Potter as su-

pervisor, on the ground that his title to the office of supervisor was defective because Schultz, the resigned justice of the peace, had not participated in his appointment and had thereupon brought *mandamus* proceedings against the town for new bonds (showing that the town was estopped by matter *in pais* from objecting that the road was not completed before April 1, 1871) and insisting that Potter was not a *de jure* supervisor, would not the decision in this very case relied upon by opposite counsel have been cited by the town to show *that the title of the officer could not be inquired into in a collateral way in such a suit.*"

If the railroad company could not even question the title of Potter on a suit for the bonds, can it be claimed that the bonds were void in the hands of the railroad company on the ground that his title was defective?

But even though the town might successfully defend against the bonds on that ground if the railroad company had brought suit upon them, it by no means follows that the same defense can be made when the suit is brought by an innocent purchaser of the bonds.

6. *For the purposes of this litigation Potter must be treated as either a* DE JURE *or a* DE FACTO *supervisor, as that matter has become* RES ADJUDICATA *by reason of the judgment in the Wallace case.*

On the 18th of January, 1873, Alexander Wallace, a brother of the defendant in error, brought suit in the court below upon some of the earlier coupons detached from part of the same bonds from which other coupons were detached which were sued upon in this case. (See Record side pages 195, 199–212, 99, 118, 119.)

That suit was brought in the name of Alexander Wallace as a matter of convenience. He did not own the coupons, but Mrs. Jennings, the defendant in error herein, did and the suit was for her use and benefit. (Record side pp. 219, 220 and 206.)

In that case the defendant filed the general issue duly sworn to. (See Stipulation side p. 196.)

This sworn plea under the practice in Illinois put in issue the execution of the bonds and the plaintiff could not recover without proof thereof.

*Strong* v. *Linington*, 8 Appellate Ct. R. 443–4.
*Hinton* v. *Husbands*, 3 Scam. 187.
*Zuel* v. *Bowen*, 78 Ill. 234.
*Davis* v. *Scarritt*, 17 Ill. 202.

*It was necessary* for the plaintiff in the Wallace case, in order to recover, to establish that Elias S. Potter not only executed the bonds in question, but that he was either a *de facto* or *de jure* supervisor of the town of Oregon when he did it, in order to recover. The fact that the bonds were held by an innocent purchaser did not render such proof any the less necessary.

*Bissell* v. *Township of Spring Valley*, 110 U. S. 162.
*Anthony* v. *County of Jasper*, 101 U. S. 693.

In the case last cited the chief justice says on page 699:

"Purchasers of municipal securities must always take the risk of the genuineness of the official signatures of those who execute the paper they buy. This includes not only the genuineness of the signature itself, but the official character of him who makes it."

The question, therefore, of whether Potter was or was not supervisor of said town when he executed these bonds *must have* been adjudicated against the defendant as the general issue, sworn to, was pleaded.

This point the record itself shows, was necessarily determined; "*that is, the verdict in the suit could not have been "rendered without deciding that matter.*"

The verdict and judgment (see Record side pages 214, 215) therefore, in the Wallace case, amounted to *res adjudicata* upon this question.

See the case of *Packet Co.* v. *Sickles*, 5 Wall. 592–3, where

the law on this point is well expressed by Mr. Justice Nelson, as follows:

"It must appear by the record of the prior suit, that the particular controversy sought to be concluded was necessarily tried and determined—that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties, and further, in cases where the record itself does not show that the matter was necessarily and directly found by the jury, evidence *aliunde* consistent with the record may be received to prove the fact."

To the same effect see *Russell* v. *Place*, 94 U. S. 608.

*But the record shows not only that this point must necessarily have been decided but also that this point was in fact decided* by Judge Blodgett in the Wallace case. See his charge to the jury in that case on side pages 206 and 207 of the record, where he said:

"They (defendant's counsel) claim that the appointment of Dr. Potter by the board was unauthorized, that is by a single justice of the peace and town clerk, and that therefore it did not amount, as I understand, to even an appointment *de facto*. With reference, then, to the first point made in regard to the appointment of the supervisor, I shall charge you that under the township organization law, as it stood in this State at the time this transaction took place, the appointment made and entered upon the books of the town, by the town clerk, created or rather invested the appointee with the powers and duties of the supervisor, *de facto;* that on his accepting the appointment and filing his bond and oath of office, he became invested with the duties of supervisor, and that until he was ousted by judicial process, his acts were binding upon the town as the supervisor of the town, in the same manner as if he had been duly elected; that strangers dealing with the town or in its corporate capacity finding upon the records the entries in due form of law, showing his appointment, would be entitled to be protected in all dealings with him as the proper officer of the town."

This was all shown in the trial of the present case in the court below, and the facts to which we have adverted bearing upon this point are uncontradicted, and we insist

that it makes out a clear case of *res adjudicata* on this point.

The fact that the plaintiff in this case was the real party in interest in the Wallace suit makes that judgment a *res adjudicata*, just as effectually as though the suit had been prosecuted in her name.

*Cromwell* v. *Sac County*, 94 U. S. 352, 359, 360.
Freeman on Judgments, Sec. 175, and cases there cited.

The fact that the first suit was brought upon coupons detached from *part* of the bonds is immaterial, as long as they are a part of the same issue.

*Beloit* v. *Morgan*, 7 Wall. 619, and cases there cited.
*Aurora City* v. *West*, Id. 96.
*Davis* v. *Brown*, 94 U. S. 428.
*Elgin* v. *Marshall*, 106 U. S. 579.
*City of Opelika* v. *Daniel*, 109 U. S. 108.

## II.

SHOULD THE ELECTION HAVE BEEN HELD AND CONDUCTED AND RETURN THEREOF MADE AS THE LAW REQUIRES FOR GENERAL ELECTIONS, OR FOR THE ELECTION OF TOWN OFFICERS?

The counsel for plaintiff in error insists that the town should not be required to pay these bonds because the election held June 23, 1870, (see Rec. side p. 180–184) was not conducted as *general* elections are required to be conducted but was conducted as elections for town officers were required to be conducted.

1. We submit that the act of March 30, 1869, under the authority of which the bonds were issued, required the election to be held and conducted, and return thereof made in the manner prescribed by the law of the organization of the body in which it was held.

All township officers are elected at an election held at

the annual town meeting in April, which is presided over by the town clerk (or in his absence by a clerk chosen by the electors for the occasion) and a moderator, *who are paid by the town.*

Gross' Statutes Ill. 1869, Arts. IV and V, pp. 744–748 and 753, Secs. 5 and 8.

General elections are presided over by three judges of election (the supervisor, assessor and collector in towns acting under township organization, being *ex officio* judges of election) and two clerks, *whose services are paid for out of the county treasury.*

Gross' Statutes Ill. 1869, p. 778 Sec. 1, and page 244 Sec. 10, and pages 248–9 Sec. 36.

The clerk of the County Court is required to issue the notices for general elections.

Gross' Stat. 1869, p. 244 Sec. 11.

But notices of town meetings for the election of town officers are to be given by the town clerk.

Gross' Stat. 1869, p. 744 sec. 1, and page 746 sec. 9.

*Returns* of general elections are required to be made by the judges of election and clerks to the clerk of the County Court and he issues the certificate of election to the county officers elected.

Gross Stat. 1869, pp. 247–8 Secs. 28 to 34.

*Returns* of town elections are required to be made out and signed by the moderator and the clerk (who may or may not be the town clerk—see Secs. 3 and 4 page 747, Gross Stat. 1869,) and filed in the office of the town clerk within two days—who issues a notice or certificate of election to the officers elected unless the poll list shows that they were present at the election and thus presumptively had notice of their election.

Gross Stat. 1869, page 748, Art. V, Secs. 22, 14 and 23.

The town clerk is also required to file in the office of the county clerk a list of the names of all town officers elected within twenty days.

Gross Stat. 1868, page 748, Sec. 24.

And sections 4 and 5 of Art. IX, provide, also, in reference to justices and constables who are elected at the same time, as follows:

"§ 4. *Return of justices and constables elected.* The town clerk, immediately after the election of justice of the peace, or the qualifying of any constable elected or appointed in their respective towns, shall *return* to the county clerk of their respective counties the names of such justices and constables."

"§ 5. *Omitting such return.* If any town clerk shall willfully omit to make such *return*, such omission," etc., etc.

By the Revised Statutes of 1874 the township organization law was amended so as to provide for more than one voting place in a township, at elections for township officers. This act required the electors, at the extra voting places, to choose one assistant moderator and one assistant clerk for each ballot box, etc.

"And at the closing of the polls all of such ballot boxes shall be brought together at the polling place where the town clerk acts as clerk of the election, and the votes shall be canvassed at the same time and in the same manner *and return thereof made the same as if all the votes had been cast in the same ballot box.*"

Revised Statutes Ill. 1874, p. 1015, Sec. 67.

This clearly shows that the legislature looked upon the filing of the election report of town elections, in the office of the town clerk who issues the notice of the election, as a "*return.*"

This shows that the learned counsel for the town is in error in claiming that no "*return*" was required to be made of elections of township officers.

The claim of counsel for plaintiff in error that the vote

for town officers at the town meeting is not an "election" is also clearly untenable.

The township organization law in force when the act of March 30, 1869, was enacted, over and over again refers to such balloting for town officers as an "*election*."

In Art. V, of the Township Organization law, the word "election" is used ten times when referring to this balloting for town officers. See Gross Stat. 1869, Art. V, pages 746–748.

For example, Sec. 7 says :

"It shall not be lawful for the electors at the annual town meeting to commence the transaction of any business except that which shall pertain to the organization of the meeting and the *election of the officers of the town*, until the hour of 2 o'clock," etc.

SEC. 10. "If any person offering to vote at *any election* or upon any question arising at such town meeting shall be challenged as an unqualified voter, the presiding officer shall proceed thereupon in like manner as the judges at the *general elections* are required, adapting the oath to the circumstances of the town meeting."

SEC. 13. * * "at all town meetings *and elections of town officers*, the polls may be closed at four o'clock in the afternoon, but may be kept open until a later hour in the discretion of the electors."

SEC. 15. "Before the *electors* shall proceed to *elect* any town officers, proclamation shall be made of the opening of the polls by the town clerk, and proclamation shall in like manner be made of each adjournment, and of the opening and closing of the polls, until the *election* is ended."

The act of March 30, 1869, under which the bonds in question were issued, did not require the election to be "held and conducted and return thereof made as *general elections*," as was the case in *Lippincott* v. *Town of Pana*, 92 Ill. 28, and *Pana* v. *Bowler*, 107 U. S. 529. The act is silent as to *what law* shall govern, whether the general election law, or the law for the election of town officers.

It says:

"And such election shall be held and conducted, and return thereof made as is provided by law; and in any village or city, as is provided by the law under which the same is incorporated, and an additional return shall be made to one of the directors of said company." (Rec. top page 4.)

It would seem that the legislature intended to refer to the law governing the election of town officers, because:

(*a.*) The expenses of the election ought to fall on the town and not on the people of the whole county, as this was a town matter.

It could only fall on the town, as we have shown, by being conducted as it was.

(*b.*) The town clerk, and not the clerk of the county court, was by this very act of March 30, 1869, required to give the notice of the election. (See Rec. top page 4, Sec. 6.) It was therefore more appropriate that the returns should be made to him than to the county clerk, as the law required in case of general elections.

(*c.*) If the election had been conducted, and return thereof made, as the law required for general elections, then there would have been no *town record* preserved whatever of the result of the election to which the public or the town officers could refer for authentic information on the subject. But if the act required the election to be conducted, and return thereof made, as the law required for the election of town officers, then the town clerk's office would show not only the proposition submitted, but also the result of the election. And the county clerk's office would also show the result of the election, as the town clerk was required to report to the county clerk the names of the town officers elected, as we have before shown. In this case the town clerk did make a report to the county clerk of the result of the election, which was duly filed in the county clerk's office. (See Rec. side p. 191.)

(*d.*) If the report of the election had been made to the county clerk and not to the town clerk how could the county clerk make any proper record of the proceeding without having before him the petition or notice of the election which contained in detail the conditions on which the aid was voted?

(*e.*) The town clerk was by the act directed to issue the bonds (with the concurrence of another town officer, viz., the supervisor) in accordance with the expressed desire of the voters. It was similar to the issuing of a certificate of election to the town officers elected.

Why should we *infer* that the legislature intended the returns to be made to the county clerk who did not issue the bonds?

(*f.*) If the language of the act is ambiguous and can be made to apply to general elections as well as to town elections, then we submit the rule laid down by the Illinois Supreme Court in a similar case (*Edwards* v. *People*, 88 Ill. on page 346) should apply. There the court said:

"The language conferring the power to vote is somewhat ambiguous, but it should receive a reasonable construction, *such as will sustain if possible the acts had under it and the rights acquired by virtue of the acts.*"

This court also has decided that where there is doubt and ambiguity as to the proper construction of an enabling act, it will not disturb "the practical construction put upon the statute at the time the bonds were issued by those immediately interested in executing its provisions."

*Kirkbride* v. *Lafayette County*, 108 U. S. on pages 211, 212.

To the same effect see, also,

*James* v. *Milwaukee*, 16 Wall. p. 162.
*Meyer* v. *Muscatine*, 1 Wall. on. p. 391.
*Van Hostrup* v. *Madison*, 1 Wall. p. 297.

(*g.*) We submit, in conclusion, that the Supreme Court of Illinois has decided this point in favor of the construction

we contend for before the bonds in question were issued.

In *People* v. *Dutcher*, 56 Ill. 145 (Sept. term, 1870), a mandamus proceeding was instituted against the town of Amboy, to compel it to issue bonds in accordance with a vote taken June 25, 1869.

The town set up, among other things, as a defense, that the vote was taken at a town meeting presided over by a moderator and town clerk, instead of being conducted as the laws regulating general elections required.

The act authorizing the vote required thirty days notice of the "*election*," but did not specify under which law it should be held and conducted.

The court held it must be conducted as election for township officers were required to be conducted—saying, on page 147:

"Do the provisions of the charter authorizing the vote in this case require that it shall be under the general election laws or under the law establishing township organization? Amboy being a township, organized under the general township law, the presumption would be, unless a contrary intention was expressed, that the election should be held in the mode prescribed for its government. *Where legislation is adopted in reference to the action of an incorporated body and no mode is prescribed in which it shall be performed, the presumption must be indulged that it is intended that the body shall act through its officers, and in the course usually adopted and authorized by the law governing the action of the body. And this being the rule, when the legislature has authorized this township as a corporate body to hold an election, and has prescribed no mode, a majority of the court hold that it was designed to authorize it to be in the manner township elections are required to be held in the election of their officers, and not under the general election laws.* And it appears that this election was conducted in conformity to the law of its organization. And in this there was no error."

In *People* v. *Town of Laenna*, 67 Ill. on page 67, the same court say, in speaking of another act which expressly required the election to be conducted as in case of *general election*—page 67·

"This act required the election to be conducted in the same manner as provided by the laws of this State for general elections.

That this election was not so conducted, is admitted, but it is insisted the term 'general election' must be interpreted in connection with and in reference to the different municipalities authorized to subscribe. This may be admitted, but it does not help the case. 'General,' as found in the act, can not mean 'regular.' It means precisely what is expressed—that the election shall be taken and held to be a general election, and have all the requisities of such an election. There must be judges and clerks; there must be a registry of voters, and all else required by the general election law. *Was the act of the legislature silent upon the manner of holding and conducting the election, then, most certainly, as the court said in The People ex rel., etc.*, v. *Dutcher*, 56 Ill. 144, *the election might be conducted in the manner prescribed by the law of the organization of the body in which it is held. This is a fair presumption;* but when the legislature expressly declares the election shall be conducted as a general election, the presumption can not obtain."

In *Dunnovan* v. *Green*, 57 Ill. 67, (Sept. term, 1870,) the court again said:

"In the case of *People* v. *Dutcher*, 56 Ill. 144, it was held that under the law of 1865 a registry was not required in a township election of this character; *that unless otherwise expressed the presumption is that it was intended where power is given to hold an election in a township it shall be held in the same manner as other town elections*, and as no registry of the voters is required but is excepted for town meetings at which town officers are elected, the registry law does not apply to an election of this character. That case is decisive of this question."

In *Town of Windsor* v. *Hallett*, 97 Ill. 208, 209, the 9th section of the enabling act, then before the court, provided that the town clerk, on receiving the required petition, should "immediately give the notice required by law for an election to be held by the legal voters of * * * such township, at the usual place of holding elections." The act was silent as to what law should apply. The court held that the election should be conducted as elections at town meet-

ings for town officers were required to be conducted, saying:

"At the annual meeting an election is held for officers by opening poll-books, receiving ballots, making tally lists and ascertaining and certifying who is elected—and this was for an election, not of officers, but to determine the question submitted to their votes. The 9th section of the charter requires an election and not a town meeting. The latter, in its proper sense, is not an election. It is a meeting for the transaction of the business of the town, the adoption of by-laws, and other matters of that character. *But at an annual town meeting those engaged in it hold an election conducted like other elections for the town officers, and such an election was no doubt contemplated by the framers of the 9th section.*"

We admit that since these bonds were issued the Illinois Supreme Court has departed somewhat from the rule laid down in these authorities but we insist that the earlier and not the later decision upon this question should govern the determination of this case.

"The sound and true rule is that if a contract, when made, is valid by the laws of the State as then expounded by all the departments of the government and administered by its courts of justice, its validity and obligation can not be impaired by any subsequent act of the legislature or decision of its courts altering the construction of the law."

*Ohio Life Ins. Co.* v. *Debolt*, 16 How. 416.
*Anderson* v. *Santa Anna*, 116 U. S. 361, 362.
*Green County* v. *Conness*, 109 U. S. 104.
*Douglass* v. *County of Pike*, 101 U. S. 677, 687.
*Taylor* v. *Ypsilanti*, 105 U. S. 60.

2. *The town is estopped by the recitals in the bonds from now asserting that the election was not properly conducted.*

The learned counsel for plaintiff in error contends that the recitals do not conclude the town, because,

*First*, the officers who issued the bonds were not authorized to make any conclusive recitals on that point.

*Second*, that the recitals are not specific enough to estop the town from showing that the election was improperly conducted.

In reply to the first objection we need simply to refer to the case of *Pana* v. *Bowler*, 107 U. S. 529, 539–543.

In that case the bonds were issued and dated June 28, 1873, after the adoption of the new Illinois Constitution of 1870.

The election was held April 30, 1870.

They were issued by the supervisor and town clerk of an Illinois township, the same as in the case at bar. The enabling act under the authority of which the bonds were issued required the election to be held and conducted as in "*general elections.*"

And the Supreme Court of Illinois had held the bonds involved in that case void in the hands of an innocent purchaser because the election was conducted as town elections are conducted.

Yet in the face of this decision by the Illinois Supreme Court this court held the bonds good on the ground that the supervisor and town clerk were the representatives of the town in that behalf. That these officers were required to decide before they issued the bonds, whether the conditions of the law had been complied with. That one of those conditions was that before the bonds should be issued a favorable vote should be obtained at a popular election to be held in accordance with the requirements of the act. That it therefore became the duty of these officers to pass upon that question before issuing the bonds and their decision that the conditions had been complied with shown by the recitals in the bond was conclusive upon the town when suit was brought on the bonds by a *bona fide* purchaser.

The counsel for the plaintiff in error seems to be laboring under the impression that an exception to the general

rule ought to be made in this case, *because the constitution as well as the statute* required as a condition precedent the holding of the popular election.

What additional force, we ask, does that add to the requirement of the enabling act ?

*The sacredness with which we are wont to look upon a constitutional enactment should not make us lose sight of the fact that a statutory enactment (if not unconstitutional), is just as good law as a constitutional enactment.*

The counsel for the town in the case of *Pana* v. *Bowler* evidently sought to impress the court with the idea that there was something peculiar about the case, and that a different rule should apply *because the constitution of the State required the election to be held.*

In reply to this idea Mr. Justice Wood, in delivering the unanimous opinion of the court, very aptly said (see pp. 539, 540 of 107 U. S.):

"It is clear that this case in no wise differs from other cases where the holding of an election and a vote of the people in favor of an issue of bonds is made by law a condition precedent upon which the authority to issue bonds rests. * * *

This court has again and again decided that if a municipal body has lawful power to issue bonds or other negotiable securities, dependent only upon the adoption of certain preliminary proceedings, such as a popular election of the constituent body, the holder in good faith has the right to assume that such preliminary proceedings have taken place if the fact be certified on the face of the bonds by the authorities, whose primary duty it is to ascertain it: *Lynde* v. *The County*, 16 Wall. 6; *Town of Coloma* v. *Eaves*, 92 U. S. 484; *Commissioners* v. *January*, 94 Id., 202; *Commissioners* v. *Bolles*, Id. 104; *County of Warren* v. *Marcy*, 97 Id., 96."

And on page 541:

"We can not follow the decision of the Supreme Court of Illinois in *Lippincott* v. *Town of Pana, ubi supra*, without overruling a uniform current of the decisions of this court, beginning with *Commissioners of Knox County* v. *Aspinwall*,

21 How. 539, and continuing down to the present time. The rights of the *bona fide* holder of negotiable municipal bonds, as we have stated them in this opinion, are too firmly settled by the decisions of this court to be shaken.

Our conclusion is, therefore, that the bonds in question in this case are valid in the hands of a *bona fide* holder, notwithstanding the irregularity in the conduct of the election by which they were claimed to be authorized."

It must be remembered that the election was presided over by a moderator and clerk in the town of Pana case, and the bonds were issued, *years afterward*, by the supervisor and town clerk. So that case completely explodes the theory of the counsel for plaintiff in error *that the supervisor and town clerk could not make a conclusive recital.*

We now come to the *second* objection, that the recitals themselves are not specific enough.

In connection with this objection we desire to call attention to the fact that a pretended election at least—one that the officers of the town, county and State treated as a legal election, was held June 23, 1870.

(See transcripts from town, county and State records. Printed Record, side pp. 179–184, 191, 261, 258 and 85.)

It was also admitted by stipulation on the trial as follows:

"*It is further admitted that no vote was taken in the town of Oregon, upon the question of issuing the bonds involved in this suit subsequent to the vote taken June 23, 1870,* which said vote was taken on the written application and election notice copies of which are attached to stipulation, dated April 28, 1884." (Rec. side p. 198).

The bonds in effect recite that they wese issued "*under authority of*" and "*by virtue of,*" the act of March 30, 1869. We shall discuss these recitals hereafter more at length under another point. (See pages 61–63 of brief.)

It is true the act of March 30, 1869, did not limit the right to hold the election to a time prior to the adoption of

the constitution (July 2, 1870), but that the constitution did.

*But it is admitted that the election in question was held before and not after July 2, 1870.*

What difference does it make then in the practical effect of the recital from what it would have been if the recital had stated that the election was held before July 2, 1870?

These bonds were registered in the office of the Auditor of State where his record showed the vote to have been taken June 23, 1870 (Rec. side page 85), and the bonds all had his certificate attached, stating that they had been registered in his office pursuant to the provisions of the Registration Law.

In *Town of Prairie* v. *Lloyd*, 97 Ill., on page 198, the Ill. Supreme Court say:

"Before railroad aid bonds can be properly registered under the above act, it must appear that they were issued in pursuance of a vote of a majority of the legal voters living in the municipality issuing them. *When once registered the presumption is they were rightfully registered, and the burden of establishing the contrary rests upon the party affirming it.*"

After July 2, 1870, there was *no authority to hold an election* under the act of March 30, 1869, or any other enabling act.

The adoption of the constitution that day operated to repeal these acts so far as they conferred power to hold any new elections.

In *Wade* v. *Town of La Moille*, 112 Ill., on page 85, the Illinois Supreme Court say:

"There was then no law which authorized the vote to be taken on the 6th of August, 1870. All previous laws that had authorized municipal corporations to vote aid to railroad or other private corporations by donation or subscription had ceased and become imperative."

How then could these officers recite in their bonds that they were issued, "*under authority of*" the act of March 30, 1869, unless the vote was taken before July 2, 1870? be-

cause after that date the act was repealed, so far that no election could thereafter be held "*under authority of*" the act.

But supposing that an election *could* be held to be "*under authority of*," and "*under and by virtue of*" the act of March 30, 1869, after July 2, 1870, and hence that the recital might refer to such an election, still that will not help the town, because the town does not offer to show that the recital refers *to such an election*, and that there was no election held before July 2, 1870. But the town wishes to show that what the officers treated as an election, was no election.

An estoppel excludes facts, *inconsistent with itself*, but not such as agree with it. Bigelow on Estoppel, 3d Ed. 314.

In *Anderson County* v. *Beal*, 113 U. S. 227, the law required a thirty days notice of the election, and the defendant offered to show that only twenty days notice was given.

Under the law the bonds in that case were admitted to be void if the election was held without proper notice, provided the county was not estopped from making that defense.

The *law* in that case was just as powerful to render the bonds void if not complied with as the *constitutional provision* is in this case.

The bonds did not, in that case, recite that the election was held on thirty days notice or on due notice, or that the bonds were issued "by virtue of," or "under authority of" the act which required the thirty days notice.

They simply stated that they were issued "in pursuance of the vote of the electors of Anderson county of September 13, 1869."

That "vote" might have been had on twenty or thirty days notice without in any wise contradicting the truth of any recital in the bonds.

Yet this court held that the county was estopped because

the recital, when taken in connection with the facts shown by the county records, the most important of which was that the order for the election was made thirty-three days before the election (though the record did not show thirty days notice was actually given), was "equivalent to a statement that '*the vote*' was a vote lawful and regular in form and such as *the law then in force* required in respect to prior notice." (See page 239 of the opinion in the case, 113 U. S.)

It should also be noted in connection with that case that the bonds stated that they were "*issued under the provisions of and in conformity to*," a prior act which had been repealed and which required "at least twenty days notice." They did not even refer to the act which alone gave them any validity and which required thirty days notice. Yet the court under the circumstances held that the recital referred to a lawful "vote" and "*such as the law then in force required.*"

Is it not equally proper in this case to hold that the recitals in these bonds which say in effect that they were issued "under authority of" and "by virtue of" the act of March 30, 1869, which required an election, are equivalent to a statement *that an election was held when there was legal power and an authority to hold election under that act.*

In *County of Warren* v. *Marcy*, 97 U.S. 96, the law also required a thirty days notice of the election, and such a notice was not given, and for this reason the Illinois Supreme Court, in 65 Ill. 90, decided that there was no power to issue the bonds.

The bonds, too, in that case, were dated Jan. 25, 1871, and were of course issued after the adoption of the constitutional provision prohibiting municipal aid to railroads, and the counsel for the county in that case made the point that they were issued in violation of this constitutional provision because the election was no election, being held without the required notice.

But this court held the county was estopped by the recitals in the bonds from setting up such a defense, although

the bonds did not state in terms that due notice had been given of the election. Mr. Justice Bradley in delivering the opinion of the court said (see page 104):

"We have substantially held that if a municipal body has lawful power to issue bonds, or other negotiable securities, dependent only upon the adoption of certain preliminary proceedings, such as a popular election of the constituent body, the holder in good faith has a right to assume that such preliminary proceedings have taken place, if the fact be certified on the face of the bonds themselves, by the authorities whose primary duty it is to ascertain it: *Commissioners of Johnson County* v. *January*, 94 U. S. 202; *Commissioners of Douglass County* v. *Bolles*, Id. 104–108; *Town of Coloma* v. *Eaves*, 92 Id. 484–488: *Lynde* v. *The County*, 16 Wall. 6. Now that is the case here. The bonds are executed by the board of supervisors, or which is the same thing, by their clerk, under their order and direction. *They certify on their face that they are issued in conformity with the vote of the electors of said county, cast at an election held on the twenty-third day of September, 1869. This, according to the cases, is a sufficient authentication of the fact that an election was duly held to protect a bona fide holder for value.*"

In *Buchanan* v. *Litchfield*, 102 U. S. 278, relied upon by opposite counsel, the legislative act itself which authorized the issue of the bonds *was passed April 15, 1873, over two and a half years after the constitutional provision was adopted* which the officers violated in issuing the bonds.

If that act had been passed *before the adoption of the constitution of 1870* and had been subsequently repealed by the new constitution so far as it related to the issue of bonds in excess of five per cent. of the assessed valuation, it would have more nearly resembled the present case.

## III.

### AS TO THE QUESTIONS ARISING UNDER THE THIRD PLEA.

*Our answer to the defense set up by the third plea is that the town is estopped from setting up that the bonds were not issued in compliance with the vote.*

We presume the first question which will naturally suggest itself to the court in the consideration of the questions which arise under the defense set up by the defendant's third plea is, why was Sec. 12, Art. IX, invoked by the defendant at all?

Why did not the defendant rely upon the provisions in the act of April 16, 1869, which are certainly as favorable to the town as those relied upon in the constitution?

They both in effect forbid bonds in a case like the present to be issued except *in compliance with* the vote of the municipality.

The act of April 16, 1869, applies to *all cases* thereafter. And Sec. 12, Art. IX, of the constitution, applies to all cases thereafter where the issue of the bonds would create an indebtedness above 5 per cent. of the assessed valuation.

As the issue of the bonds in this case *did* make the indebtedness exceed 5 per cent. of the assessed valuation, that brought the present case within the operation of both laws, the statutory law and the constitutional law.

In order to show that the *constitutional law*—where bonds are voted upon conditions as they were in this case—is no stronger or more efficacious for the defendant than the *statutory law*, we will quote them both.

The statutory law is as follows:

"And any county, township, city or town, shall have the right upon making any subscription or donation to any railroad company to prescribe the conditions upon which such bonds, subscriptions or donations shall be made, and such bonds, subscriptions or donations *shall not be valid and binding until such conditions precedent shall have been complied with.*"

Sec. 7, Act of April 16, 1869, page 556, Gross' Stat. Ill., 1869.

Section 12, article IX of the present constitution, in force August 8, 1870, provides as follows:

"§ 12. No county, city, township, school district or other "municipal corporation, shall be allowed to become indebt- "ed in any manner or for any purpose, to an amount, in- "cluding existing indebtedness, in the aggregate exceeding "five per centum on the value of the taxable property there- "in, to be ascertained by the last assessment for State and "county taxes, previous to the incurring of such indebted- "ness. Any county, city, school district or other municipal "corporation, incurring any indebtedness as aforesaid, shall "before, or at the time of doing so, provide for the collec- "tion of a direct annual tax sufficient to pay the interest on "such debt as it falls due, and also to pay and discharge "the principal thereof within twenty years from the time of "contracting the same.

"This section shall not be construed to prevent any coun- "ty, city, township, school district or other municipal cor- "poration from issuing their bonds *in compliance with any* "*vote of the people, which may have been had prior to the adop-* "*tion of this constitution in pursuance of any law providing* "*therefor.*"

The statute law says the bonds, when voted on condition, "shall not be valid and binding until such conditions prece- dent shall have been *complied with.*"

The constitutional law says the bonds shall not be issued unless "*in compliance with*" the vote of the people.

Surely the constitutional law does not apply to this case any better for the defendant than the statute law does.

Why then did the able, astute and learned counsel for the town go to the trouble of setting up the fact that the issue of these bonds increased the indebtedness of the town to more than five per cent. of its assessed value, in order to bring the case within the provisions of this section of the constitution?

(*a*) Was it because counsel supposed that the court would regard the constitution as such a sacred instrument that it would not permit officers of a town, by any recitals, to estop the town from showing that the bonds were not issued "*in compliance with*" the vote of the people? Did counsel suppose that he could get the court to hold

that, although an estoppel would be good enough to prevent evidence showing a violation of *statutory law*, it was not good enough to prevent evidence showing a violation of *constitutional law?*

If so, he certainly had not seen the cases of *Pana* v. *Bowler*, 107 U. S. 529, 539, and *County of Warren* v. *Marcy*, 97 U. S. 96, 100 and 104, and others that might be cited, where an estoppel, by recitals in municipal bonds, was held good enough to prevent the introduction of evidence showing that they had been issued in violation of constitutional law.

(*b*) Or did counsel suppose that he could excite the sympathy of the court by having this excuse for showing that these bonds increased the indebtedness of the town beyond the constitutional limit of five per cent? If so we reply the case of this town is not an isolated one.

In *City of Springfield* v. *Edwards*, 84 Ill. 637, Dickey, J., said:

"In 1870, when this constitution was framed and adopted, it was well known as a matter of public history *that three fourths of all the cities in the State* were already respectively indebted and had issued their bonds for an amount beyond the limit expressed."

(*c*) Or did the counsel for the town fear that if he relied alone upon the *statutory law* he would be successfully met with the plea of *res adjudicata*—that the same identical defense under that statute law had been before the court in the Wallace case, and had been decided against the town?

(*d*) Or did counsel fear that the case of *Ins. Co.* v. *Bruce*, 105 U. S. 328, *quotuor pedibus currit*, against him too much to rely simply upon the *statutory law?*

Whatever *reason* the counsel for plaintiff in error had for setting up this constitutional provision, the fact certainly remains that the constitutional provision is no better law or more potent law than the statutory provision.

The statutory provision is *law*. The constitutional pro-

vision is *law*. Neither one is any more potent, sacred or efficacious than the other, as they do not conflict.

The act of March 30, 1869, under which the bonds in this case were issued, made it the duty of the surpervisor and town clerk, after the election, to issue the bonds "*as shall be determined at said election.*" See Sec. 3 of act March 30, 1869, top pp. 4 and 5 of record. They were not authorized to issue them except *as should be determined at said elect on.*

But if this provision in the enabling act had been entirely omitted, still even then the voters would have had the right to impose conditions (independent, too, of the act of April 16, 1869,) and the officers would in that case have had no "*authority*" under the act or "*by virtue of the act,*" to issue the bonds except on a compliance with the conditions.

*People* v. *Dutcher*, 56 Ill. 148.
*People* v. *Glann*, 70 Ill. 234.
*People* v. *Holden*, 91 Ill. 450.
*Ins. Co.* v. *Bruce*, 105 U. S. 331–333.

In *People* v. *Dutcher*, 56 Ill. 148, 149, above cited, the court say:

"It is true the law has failed to authorize conditions to be imposed by the voters, but it has not prohibited their imposition. * * *

We have no hesitation in saying, that the electors might vote to subscribe on any conditions they might see proper to annex, and that the company can only receive it on the terms prescribed by the vote. * * *

In the case at bar, the relator claimed the right to an unconditional subscription, and it is the purpose of this proceeding to compel the supervisor to make such a subscription. *We have seen that he is not authorized, under any circumstances,* or at any time, to make a subscription upon any but the conditions it was voted."

In *People* v. *Glann*, 70 Ill., on page 234, the court say again

"That the town had authority to impose these conditions, notwithstanding the law authorizing the subscription is silent upon the subject, was held in *People* v. *Dutcher*, 56 Ill., 145, and is not now attempted to be questioned."

The defendant's third plea after setting out the assessed valuation of the property in the town, the fact that a condition was imposed by the vote and that the condition had not been complied with, asserts the logical and legal conclusion of the matter in this language: "And so the defendant in fact saith that the said bonds and coupons *were issued without authority of law*," etc., etc.

But the bonds recite in substance that they *were* issued "*under authority of*" and "*by virtue of*" a law of the State, to wit, the act of March 30, 1869.

*Which averment is to be taken as the truth in this case?*

The averment made by the town officers to the public when they sought to induce the public to invest in the bonds or the averment of the counsel for the town now, when the town is trying to escape payment?

Mrs. Jennings, the defendant in error, swore:

"When I purchased and acquired said bonds and coupons, I had no knowledge, information or notice that said Ogle & Carroll County Railroad Company had not, on or before January 1, 1870, completed the first division of its road." * * * * "I did not know when the said Ogle & Carroll County railroad, or the said Chicago & Iowa railroad was completed, either the first division or any other; but I supposed when I bought the bonds that all the conditions, if any existed, had been fully complied with. The bonds bore the certificate of the auditor of the State of Illinois that they had been registered in his office, and the bonds, on their face, stated substantially that they had been issued under authority of, and by virtue of an act of the legislature of the State of Illinois; *I did not consider it necessary for my protection to look further in respect to them. I thought I had a right to rely upon them*, especially as Mr. Coler (a dealer in municipal bonds, Rec. side p. 228) said they were all right, and recommended them so highly to me. I had no knowledge whatever of said railroad. * * I

never was at the town of Oregon in my life, and know nothing about it." (Rec. top p. 139.)

Part of her bonds she bought from W. A. Coler, a dealer in municipal bonds. They cost her one hundred cents on the dollar. (Rec. side p. 245.) The balance she purchased from her two brothers, William S. Wallace and Alexander Wallace.

William S. Wallace paid $1,000 in cash for each of his bonds (Rec. side p. 236) and took them without notice. (Rec. side pp. 238–242.)

Alexander Wallace paid par for his, less the difference between "seven per cent., the rate the bonds drew, and ten per cent., the rate money was then worth." (Rec. side p. 228.) He also was an innocent purchaser without notice. (Rec. side p. 228–231.)

But the learned counsel for the town insists, *first*, that the supervisor and town clerk had no authority to bind the town by recitals, and *secondly*, that the recitals are not full and specific enough to conclude the town.

Let us examine these objections in their order.

1. Did the supervisor and town clerk, who issued these bonds, have authority to make conclusive recitals in the bonds which should estop the town from setting up that conditions were imposed by the vote which were not complied with.

We can get no aid in determining this question from the Illinois decisions, because the Illinois Supreme Court does not recognize the right of any municipal officer to estop the municipality of which he is an officer, by any recitals in bonds issued by him.

In *Scates* v. *King*, 110 Ill. 470, Justice Mulkey, in delivering the opinion of the court, said:

"As is well known there is, and for many years past has been, a manifest mutual diversity in one respect, in the holdings of the Federal courts and the courts of this State,

as to the liability of counties and other municipalities on bonds issued by them in aid of railroads and other like enterprises; the former holding, if there is a valid law authorizing the issue of such bonds upon certain specified conditions, and the corporate authorities or legally constituted agents of the municipality, whose duty it is to determine whether those conditions have been performed or not, find as a fact the law has been complied with respecting such conditions, and issue the bonds containing recitals to that effect, the municipality will be liable on the bonds in the hands of innocent holders, whether the conditions have been really performed or not; while on the other hand, the courts of this State have uniformly held there must not only be a valid law authorizing the issuing of the bonds, but also a substantial compliance on the part of the municipal authorities with the requirements of the law, otherwise the municipality will not be bound."

Another reason why the Illinois decisions so much relied upon by the counsel for the town have no real bearing upon the discussion of this question is, that not one of them is a construction of Sec. 12, Art. IX, of the constitution. They do not even refer to that provision or pretend to consider the question of the power of municipal officers to estop the corporation from setting up that the conditions of the vote had not been complied with when the bonds were issued.

Under the act of March 30, 1869, we have shown *ante*, page 49, the voters had the right to impose conditions on the issuing of the bonds, and that unless those conditions were complied with the supervisor and town clerk had no authority to issue the bonds.

*Whose business was it to determine whether those conditions imposed by the vote had been complied with or not?*

Clearly it was the business of the supervisor and town clerk, who were the "*proper corporate authorities*" of the town, and by the act they were expressly required to sign the bonds. And their decision as shown by the recitals in the bonds is *conclusive* against the town. For authorities on this point see

*Ins. Co.* v. *Bruce*, 105 U. S. 328.
*Walnut* v. *Wade*, 103 U. S. 695.
*Pana* v. *Bowler*, 107 U. S. 529.

In each of the above cases this court held that a supervisor and town clerk in Illinois *could*, by recitals in bonds issued by them, estop the town from showing the facts, which, if allowed to be shown, would have destroyed the validity of the bonds issued by them on behalf of their respective towns.

Where could the plaintiff in this case, or other person intending to invest in these bonds, go but to the decision of these officers, as shown by the recitals in the bonds, to get correct and official evidence of whether the conditions had been complied with or not?

There was no other record on the subject save in the auditor's office and in the town supervisor's book and these records both showed that the vote was taken June 23, 1870, and that the bonds were issued in pursuance of the election or that all the preliminary conditions had been fully complied with. (Rec. top pp. 140 and 141.)

The town clerk's records would have shown that the election was held June 23, 1870; that the vote was on condition that the road should be completed by January 1, 1870.

But there was no record showing that the road was not completed by January 1, 1870.

If, however, an intending purchaser had actually known that the road was not completed until three months after the time limited in the vote and had known of the conditions of the vote, still we submit that even then he would not be charged with any notice that the bonds were illegally issued. Why? Because, the town could estop itself by matter *in pais* from asserting that the road was not completed on time and when the bonds recited that they were issued under the authority of and by virtue of the act, he was officially informed that something of that kind had

occurred, or else these officers whose duty it was to decide on the matter would not have so decided.

This court and the Illinois Supreme Court both agree that a municipal corporation can estop itself from asserting a fact by matter *in pais*.

*County of Randolph* v. *Post*, 93 U. S. 512–514, and cases cited.

*Martel* v. *City of East St. Louis*, 94 Ill. 69, and cases cited.

*People* v. *Holden*, 82 Ill. 102.

In *County of Randolph* v. *Post*, 93 U. S. 502, the bonds were voted on condition that the road should be completed within a certain time.

The condition was never complied with, but the bonds were issued and dated after the Illinois Constitution of 1870 was adopted.

The bondholder claimed an estoppel *in pais* by the conduct of the municipality and this court sustained this position, saying per Mr. Justice Hunt, on pages 513, 514:

"We should unreasonably restrict the rights and powers of a municipal corporation were we to hold that it did not possess the power to alter its legally made contract by waiving conditions found to be injurious to its interests, or that it could not estop itself like other parties to a contract: Bigelow on Estoppel, 464; *Moran* v. *Comm'rs*, 2 Black, 722; *Zabriskie* v. *Cleveland*, 23 How. 400; *Pendleton* v. *Avery*, 13 Wall. 297; 1 Dill. Mun. Cor., Sects. 375, 383, 385, 398.

In the present case, the county, by an order in writing, made on the 6th day of October, 1871, expressly agreed, for reasons satisfactory to itself, to extend the time of completing the road from the 27th day of December, 1871, to the 1st day of February, 1872. Before that time, to wit, on the 19th day of January, 1872, it declared the road to be completed to its satisfaction, delivered its bonds to the company and received its stock in return, which it still holds and owns. That this constitutes a waiver and an estoppel, which, under ordinary circumstances, would prevent the obligor from raising the objection that the contract had not

been performed in time, the authorities leave no doubt. *Muller* v. *Ponder*, 55 N. Y. 325; *Barnard* v. *Campbell*, Id., 457; *McMaster* v. *Bank*, Id., 222; *Kelly* v. *Scott*, 49 Id. 601; *Dezell* v. *O'Dell*, 3 How. 215; *Grand Chute* v. *Winegar*, 15 Wall. 372; *Mercer Co.* v. *Hackett*, 1 Black, 336; *Gelpcke* v. *Dubuque*, 1 Wall. 175; Id. 184; *County of Moultrie* v. *Savings Bank*, 92 U. S. 631; *Converse* v. *City of Fort Scott*, Id. 503."

In *Martell* v. *City of East St. Louis*, 94 Ill. 69, the Supreme Court of Illinois says:

"The doctrine of estoppel *in pais* has been held by this court to be applicable to municipal corporations as well as to private corporations and citizens; but the public will only be estopped, or not, *as justice and right may require. Any positive acts by municipal officers which may have induced the action of the adverse party, and where it would be inequitable to permit the corporation to stultify itself by retracting what its officers had done, will work an estoppel: Roby* v. *City of Chicago*, 64 Ill. 447; *Chicago, Rock Island and Pacific Railroad Co.* v. *City of Joliet*, 79 Id. 39; *Logan Co.* v. *City of Lincoln*, 81 Id. 156."

In *People* v. *Holden*, 82 Ill. 94, a mandamus proceeding was instituted against the supervisor and town clerk of the township of Danville, to compel them to issue bonds. One of the defenses to the proceeding relied upon by the town was, that the bonds had been voted on condition that the road should be conpleted by Nov. 6, 1874, and that the condition had not been complied with and that the road was not completed until September, 1875.

The railroad insisted that the town was estopped by the conduct of its officers from making such a defense and the Supreme Court sustained this position, saying, in the opinion which was delivered by Mr. Justice Breese, pages 101 and 102:

"It is a sound principle everywhere recognized that a party who prevents a thing being done at the time stipulated, shall not avail of the non-performance he has himself occasioned." * *

"It is plain the defendants in error (the supervisor and town clerk) prevented the construction of the road the entire

length, within the time limited, and they can not take advantage of their own wrong." Again, on page 103, the court say: "The relators seem to have exerted themselves to bring their enterprise to a successful termination within the time limited, and would have done so had they not been prevented by the refusal of the defendants to perform their duty. The road is completed from one terminus in Paris, Edgar county, to the city of Danville, in the township of Danville, and is answering all the demands and wants of the public, and there is no reason or justice in permitting the township to escape its liabilities. Even if the road had not been completed within the time, in the absence of any fault on the part of the defendants, still, it would be received if it was completed and equipped, and in successful operation, as this road is. *Such a plea ought not to avail in a court where justice is supposed to be administered.* The town has obtained all it expected to obtain, and ought to pay what it agreed to pay. If the defendants, or those they represent, have sustained damages by the delay, they might be entitled to recover from the company to the extent of these damages. This would be more in accordance with justice than the demand they set up, that they shall go 'Scot free,' although the road has been made for them as contemplated."

This mandamus proceeding took place after the adoption of the Illinois Constitution of 1870, and the only authority for the issue of the bonds arose from a vote taken before the adoption of the constitution, which vote contained the said condition that had not been complied with, and yet the court held it the duty of the supervisor and town clerk to issue the bonds, notwithstanding the road was not completed on time.

It may be the road was not completed on time in this case by fault of the town. Perhaps the town officers delayed the railroad company by improperly refusing to permit the company to cross a town road.

Perhaps the officers of the town tore up the track where it connected with the North-western Railroad, at Rochelle, in order to force the company to build a new independent line to Aurora, where it could connect with the C., B. & Q. R. R.

Perhaps the town officers were not to blame for the tearing up of the track, but lulled the railroad company into fancied security after the track had been torn up, by promising to extend the time of completion in consideration thereof, until April 1, 1871. If so, then, under the authority of *County of Randolph* v. *Post*, 93 U. S. 502, the town would be estopped from objecting that the road was not completed on time.

Or some other thing may have worked an estoppel *in pais;* for, to use the language of the Illinois Supreme Court, in 94 Ill. 69, above cited, "any positive acts by municipal officers which may have induced the action of the adverse party, and where it would be inequitable to permit the corporation to stultify itself by retracting what its officers had done, will work an estoppel."

An estoppel prevents any inquiry into the matter; whether in fact the matter be true or false is immaterial for the purposes of the case; the matter which a party is estopped from denying, must be treated as though it was the very truth.

*Nauvoo* v. *Ritter*, 97 U. S. 389.
*Block* v. *Commissioners*, 99 U. S. 696.

If there were matters in existence which estopped the town of Oregon from asserting that the road was not completed on time, who, we ask, was to decide on the matter?

If such matters of estoppel existed, then it clearly was the duty of the supervisor and the town clerk, after the road was completed, April 1, 1871, to issue the bonds. The Supreme Court of Illinois would have compelled them to have issued the bonds on mandamus proceedings against them.

Was it not therefore the sole province of these two officers to decide whether such matters of estoppel existed as gave them authority under the act to issue the bonds after April 1, 1871?

What other officer *could* decide it for them?

It clearly was their duty to decide it, and they *did* decide that they had authority under the act to issue the bonds although the road was not completed until April 1, 1871, and evidenced that decision by their recitals in the bonds that they were issued "*under authority of*" and "by virtue of" the act of March 30, 1869.

Was it the duty of the plaintiff to go further than this decision and investigate for herself before buying the bonds, to see whether these officers had decided correctly?

If the law did impose any such duty on her it was contrary to the general rule laid down by this court as far back as *Commissioners of Knox County* v. *Aspinwall*, 21 How. 539, and extending down to the present time.

And it involved the investigation of a very difficult matter. An estoppel *in pais* usually consists of acts which are not preserved in any public record but rest simply in the memory of witnesses.

All the public records relating to this matter the town allowed—down to the time of this trial—to show everything favorable to the validity of the bonds.

The bonds are dated December 31, 1870. The town records show that on that day Potter was supervisor *and continued to be as shown by these town records* down to the time of the election and qualification of Dwight, his successor, in April, 1871. (Rec. side pp. 274 and 275.)

The supervisor's book was allowed to show the due and proper registration of the bonds through all these years and that they were issued "*in pursuance of an election held by the legal voters of said town, on the 23d day of June, A. D. 1870*, under the provisions of" the act of March 30, 1869. (Rec. side p. 258.)

And although this registration may have been made in the handwriting of Town Auditor Cartwright instead of being in the handwriting of the supervisor, the public had no means of knowing that fact. But even if that fact was

known, still the public knew also that the supervisor could, if he wished, employ a clerk or amanuensis to enter the registration upon the book, and they had means of knowing that Cartwright had not been so employed.

The State auditor's office also showed that the bonds had been duly registered there.

The fact that the certificate for registration stated that it was made upon "the information and belief" of the officer, was nothing to excite any suspicion, as the Illinois Supreme Court in *Decker* v. *Hughes*, 68 Ill., page 46, decided that that was the proper way for the officer to make it, as it could hardly be possible for the officer to have personal knowledge of every fact which he is required to certify to.

If, under these circumstances, the decision of the town officers, that they were authorized to issue the bonds, as shown by their issuing them, with the recitals therein that they were issued *under authority* of the law, etc., is not sufficient to estop the town from now setting up, as a defense, that they did not have authority to issue the bonds, then we submit the town ought to be required to prove its case fully and completely. The Illinois cases cited by opposite counsel on the question of the *burden of proof* have no application, as the Illinois Supreme Court does not treat a recital in a bond of compliance with the law as any proof of performance of conditions, whereas this court has always treated such recital as *conclusive evidence* thereof.

*It is not enough for the town to show that the vote was on condition that the road should be completed by January 1, 1871, but the town should also have shown that when the bonds were issued, the town was not estopped from objecting to the delay of three months in the completion of the road.*

Without showing this it is impossible for the court to determine that the decision of the officers in favor of issuing the bonds was wrong.

If the town can now impeach that decision it should show by satisfactory evidence that the decision under the facts

then existing *could not have been rightfully made.* It is not sufficient to show that it *may* have been wrong but it should show that it *was* wrong.

To do that it was necessary for the town to show that when the bonds were issued the town was in a condition to legally defend against a *mandamus* proceeding for the bonds, that no estoppel existed to prevent the town from insisting on the very terms of the vote.

(2) *Are the recitals in the bonds, or the recitals in connection with the records, sufficiently specific to estop the town from insisting now as a defense against the plaintiff, an innocent purchaser, that the officers had no authority to issue the bonds?*

Upon this question we say: *First,* the recitals *are sufficient ;* and *secondly,* that this question was determined in our favor in the Wallace case, and is therefore *res adjudicata.*

In considering this point it must be borne in mind that we are not claiming that the officers of the town by any recitals in the bonds have estopped the town from setting up that this issue of bonds created an indebtedness for the town exceeding 5 per cent. of the assessed value of property in the town.

If *that* was what we were claiming for the recitals, then the cases relied upon by opposite counsel would be in point; but we have never claimed anything of the kind.

There are two things which must exist, and which the town must not be estopped from showing in order to make Sec. 12, Art. IX, of the constitution, available as a defense.

*First,* that these bonds did create an indebtedness in excess of 5 per cent. of the assessed value of property in the town.

The recitals in the bonds we admit do not work an estoppel against the town from showing the facts on this point and they were shown to be as the town claims. We do not deny it.

But still there is one more thing equally as important which the town must show in order to get any benefit from Sec. 12, Art. IX. That is that the bonds were not issued "in compliance with any vote of the people which may have been had prior to the adoption of this constitution in pursuance of any law providing therefor."

*See last clause of Sec. 12, Art. IX, of Ill. Constitution of 1870.*

As to this last matter we claim the estoppel applies.

The town says the act of March 30, 1869, gave power to the town to impose conditions in their vote if they wished to, and that the town officers in such case had no authority to issue bonds except *in compliance with* the vote. True, we say, but who is to determine what is *a compliance with* the vote.

The Supreme Court of Illinois and this court have both determined that bonds are issued in compliance with the vote where the road was not completed in the time required by the vote, if the town is estopped by matter *in pais* from asserting that fact. See cases cited *ante*, pages 54–56.

The recitals in the bonds we say *conclusively establish* that the bonds *were* issued "in compliance with" a vote of the people had in pursuance of the act of March 30, 1869.

But the town insists the recitals are not explicit enough.

In *Dixon County* v. *Field*, 111 U. S. 92, 93, Mr. Justice Field, in delivering the opinion of the court, said:

"It is not necessary, it is true, that the recitals should enumerate each particular fact essential to the existence of the obligation. *A general statement that the bonds have been issued in conformity with the law will suffice, so as to embrace every fact which the officers making the statement are authorized to determine and certify.* A determination and statement as to the whole series, where more than one is involved, is a determination and certificate as to each essential particular."

Again it is said by this court in *School District* v. *Stone*, 106 U. S. pp. 183, 187:

"Numerous cases have been determined in this court, in which we have said that where a statute confers power upon a municipal corporation, upon the performance of certain precedent conditions, to execute bonds in aid of the construction of a railroad, or for other like purposes, and imposes upon certain officers, invested with authority to determine whether such conditions have been performed, the responsibility of issuing them when such conditions have been complied with, recitals by such officers, that the bonds have been issued "in pursuance of," or "in conformity with," or "by virtue of," or "by authority of," the statute, have been held, in favor of *bona fide* purchasers of value, to import full compliance with the statute, and to preclude inquiry as to whether the precedent conditions had been performed before the bonds were issued."

The bonds in this case, after making the usual promise to pay, contain this recital:

"For which payment of principal and interest, well and truly to be made, the faith, credit and property of the said town of Oregon are hereby solemnly pledged, *under authority* of an act of the general assembly of the State of Illinois, entitled 'An act to amend an act entitled an act to incorporate the Ogle and Carroll County Railroad Company,' which said act was approved March 30, A. D. 1869. This bond is one of a series numbered from 21 to 60 inclusive, for one thousand dollars each, which bonds, so numbered, together with another series numbered from 1 to 20 inclusive, for $500 each, are the only bonds issued by said town of Oregon, *under and by virtue of said act.*" Record, side p. 91.

The act under which these bonds were issued gave these officers the right to pledge the faith, credit and property of the town where the bonds were legally issued, under the authority of the act in these words:

"*And any such town*, village or city so *subscribing, donating* or loaning, *as aforesaid, shall by its proper corporate authority, annually thereafter, assess and levy a tax upon the taxable property of said town*, village or city, sufficient to pay and liquidate the annually accruing interest on such bonds, and so much of the principal thereof as, from time to time, shall become due; which taxes shall be levied and collected

in the same manner as other corporation taxes in such town, village or city:

*Provided*, that for the payment of the principal thereof such tax shall not exceed two per cent., per annum."

This pledge of the faith, credit and property of the town, authorized by this power of taxation conferred by the act was no meaningless form of words.

Any act of the legislature in attempted violation of this pledge would be unconstitutional.

*Von Hoffman* v. *City of Quincy*, 4 Wall. 535 and 555.
*Wolff* v. *New Orleans*, 103 U. S. 358.

In *County of Kankakee* v. *Ætna L. Ins. Co.*, 106 U. S. on page 670, Mr. Justice Mathews uses this language:

"* * * the power to pledge the faith of the county for the annual payment of the interest and the ultimate redemption of the principal, a pledge which means, of course, that payment shall be made out of the revenues of the county derived from taxation."

The recital in the bonds that its officers "*under authority of*" the act of March 30, 1869, pledged the property of the town for the payment of the bonds, which could only be done as we have shown, when the bonds were legally issued, was sufficient of itself to estop the town independent of the further recital that the bonds were all with others issued "*under and by virtue* of said act."

In *Sherman County* v. *Simons*, 109 U. S., 735, the only recital was that the bonds were issued "*by authority of said act*," and yet this court held it a sufficient recital to estop the county from showing that more bonds were issued than the act authorized, Mr. Justice Woods saying:

"The defendant in error is found by the Circuit Court to be a *bona fide* holder for value. According to repeated decisions of this court, being such, he was not bound to go behind the law and the recital of the bonds to inquire into the amount of the county indebtedness: *Marcy* v. *Township of Oswego*, 92 U. S. 637; *Humboldt Township* v. *Long*, Ib. 642; *Wilson* v. *Salamanca*, 92 U. S. 499."

In *Ins. Co.* v. *Brue*, 105 U. S. 328, the bonds were voted for at an election held September 7, 1869, and were Illinois township bonds issued after the new constitution of Illinois of 1870 took effect.

The act under which the bonds were issued was silent on the subject of conditions in the vote; but the town did by the vote impose conditions with respect to the construction of the railroad which it was conceded had never been complied with.

The bonds recited that they were issued "*by virtue of*" the statutes of April 15, 1869, and April 16, 1869, the last act being the one quoted on page 46, *ante*, of this brief.

This court held that the recitals estopped the town from setting up as a defense the non-fulfillment of the conditions on which the bonds were voted, saying (see pages 330–333 of the report):

"These facts are set out in detail in the special plea of the town. Do they constitute a defense against a *bona fide* holder, for value, of the bonds and these coupons? Or to state the question more distinctly, can the town, after the bonds have been signed, sealed and delivered, by its constituted authorities, to the railroad company, and have passed into the hands of *bona fide* holders for value, escape liability by showing that the conditions, or some of them, imposed by popular vote, have not been complied with upon the part of the railroad company?

The statute did not make it obligatory on the town to impose conditions upon the performance of which its liability should depend. It conferred simply the right to do so, leaving the town at liberty to prescribe conditions or to make an unconditional subscription. Consistently with the statute the town could issue and deliver bonds for the subscription in advance of the construction of any part of the road. But when conditions were prescribed, good faith and the obligations which everywhere arise out of negotiable securities, required, if the town intended to rely upon them, that the public, who were expected to buy the bonds or to advance money upon them, should be informed by their recitals that the town had exercised its statutory right

to impose conditions upon its liability. The officers both of the town and the railroad company knew, however, that bonds could not have been negotiated in the market had their recitals disclosed the fact that payment depended upon conditions thereafter to be fulfilled by the railroad corporation. To the end, therefore, that money might be raised for the construction of the proposed road, or in reliance upon the performance by the railroad company of the conditions imposed, the constituted authorities of the town, and the officers or agents of the company, co-operated in putting out bonds negotiable in form and with recitals that gave no intimation even that the subscription was conditional. The fact that conditions had been prescribed was omitted in recitals full of everything necessary to induce the public to buy the bonds.

The statement on the face of the bonds, that they were issued by virtue of the statutes of April 15, 1869, and April 16, 1869—the first of which contains *an absolute requirement that the bonds be issued and delivered upon the subscription being voted*, while the second gives the *right*, but does not make it imperative, to impose conditions—and the further statement that the people had voted for subscription *and to issue township bonds therefor*, fairly imported that nothing remained to be done in order to make the bonds binding obligations upon the town in the hands of *bona fide* purchasers.

Under these circumstances, the town, by every principle of justice, is estopped, as against a *bona fide* holder, to plead conditions, the existence of which was withheld from the public, either to facilitate the negotiation of the bonds in the markets of the country, or because it had full confidence that the railroad company would meet the prescribed conditions. It should not now be heard to make a defense inconsistent with the representations contained in the recitals upon its bonds, or upon the ground that the conditions imposed, of which purchasers had no notice, have not been performed."

* * * * * *

On page 333:

"In the present case, the town of Bruce did not make, in express terms, a representation of that character. But, in effect, by the recitals in its bonds, it did represent to the public that the bonds were issued in all respects in conform-

ity to law, and that nothing remained to be done which was essential to its liability thereon."

It seems to us that the principles laid down in the case last cited must control the decision in this case.

Although the bonds in this case did not show when the vote was taken that does not prevent the recitals from operating as estoppels.

No attempt was made by the town to show that the election took place after the adoption of the new constitution, which virtually repealed that part of the act of March 30, 1869, which authorized the holding of an election under it. (See, on this point, pages 41–45 *ante*, of this brief.)

But it was admitted that the election took place before the adoption of the new constitution, when it could lawfully be held, and the effort of the learned counsel for the town was to show that the officers of the town had no authority to issue the bonds because the conditions legally imposed by the vote were not complied with.

That proof was offered in face of the fact that it would, if introduced, contradict *and be inconsistent with the recitals in the bonds.*

*An estoppel excludes facts inconsistent with itself,* but not such as agree with it.

Bigelow on Estoppel, 3d Ed. 314.

The records of the town, too, showed that the election was held before the adoption of the new constitution.

The municipal records may be referred to in order to help out and give effect to the recitals in the bonds so as to sustain their validity.

*Anderson County* v. *Beal,* 113 U. S. 227, 238, 239.

See pages 43 and 44 *ante* of this brief where this case is quoted from.

A municipality may be estopped from contradicting the recitals in its records equally as well as the recitals in its

bonds, when by so doing it would invalidate the action of its officers.

*Block* v. *Commissioners*, 99 U. S. 696.
*Township of Rock Creek* v. *Strong*, 96 U. S. 278.
*Hannibal* v. *Fauntleroy*, 105 U. S. 413.

*The adoption of Sec. 12, Art. IX in the constitution of 1870, did not introduce any new rule of evidence by which the courts thereafter were to determine the question of whether bonds had been issued "in compliance with" the vote of the people or not.*

The old rules of evidence still apply. In the Federal courts these rules will not permit the town to show that the vote was not *complied with* when it would be inconsistent with the recitals made by the officers issuing the bonds. Hence it stands for the purposes of this suit just as though no such proof was in existence, as it can not have any application to the case.

The constitutional provision is not violated. But by applying the well settled rules of evidence in force in the Federal courts to the case it is *conclusively established* that the conditions of the vote were complied with.

*3. The question of whether the recitals in the bonds when properly construed amount to a declaration that the conditions of the vote have been complied with, is not open for controversy in this case. That question has become* RES ADJUDICATA *by the decision in the Wallace case.*

In the Wallace case the evidence on the question of compliance with the conditions of the vote was the same as that used in the trial of this case. See stipulation and evidence, Rec. side pages 99 to 163.

In the Wallace case it was equally as fatal to the plaintiff's right to recover—if the conditions of the vote were shown not to be complied with—as it was in this case.

We have shown that under the enabling act of March 30, 1869, the town had the right to impose conditions, and

when conditions were so imposed, there was no authority to issue the bonds without a compliance with the conditions. (See *ante* pages 49 and 50 of brief.)

The act of April 16, 1869, which also authorized conditions to be imposed, and provided that the bonds should not be valid until the conditions were complied with, applied to the Wallace case the same as it does to this case.

There was no proof in reference to the amount of the debt of the town or the assessed value of the property therein, necessary to make either of these two laws bear upon the case.

Whilst the town did not, in the Wallace case, contend that the bonds were void because they were issued in violation of Sec. 12, Art. IX, of the constitution, the town *did* contend that the bonds were void because the conditions of the vote were not complied with.

It was not necessary in the Wallace case to make this defense of a non-compliance with the conditions of the vote in a special plea. The general issue was sufficient for such a defense.

*Wilson* v. *King*, 83 Ill. 238.
*Town of Windsor* v. *Hallett*, 97 Ill. 204, 206.
*Craig* v. *State*, 4 Peters, 426,
*Chambers County* v. *Clews*, 21 Wall. 317, 323.

In the Wallace case, Judge Blodgett decided that the recitals in the bonds should be construed as a declaration that the bonds had been issued in conformity with the act.

See side pages 206 and 210 of the record where Judge Blodgett, in his charge to the jury in the Wallace case, among other things said:

"It is claimed, however, on the part of the defendant, that these bonds were issued in violation of the condition which was annexed to the grant or vote, by which the town agreed to their issue, inasmuch as the railroad was not completed by the first day of January." * * * "The purchaser

of bonds is not bound to look into these matters; he is entitled to presume that the officers of the corporation did their duty and that they did not put the bonds in circulation without either the fact being performed according to the conditions of the vote, or that being waived by some action of the people or the authorities. This question was expressly decided as I said in the late case, by the Supreme Court of the United States against Putnam county, where the bonds had been put in circulation before the conditions were performed.

The Supreme Court held that a purchaser for value was not bound to look beyond the face of the bonds themselves.

This bond bears upon its face the statement that it is issued by the authority of an act of the general assembly of the State of Illinois, entitled, 'An act to amend an act entitled an act to incorporate the Ogle & Carroll County Railroad Company,' which said act was approved March 30, 1869. *Right upon the face of the bond, it bears the assertion that it is issued in conformity with the act in question.*"

We have heretofore, on page 30 of this brief, referred to authorities showing that the decision in the Wallace case was *res adjudicata* for this case, although that case was prosecuted by Mrs. Jennings in the name of her agent, or trustee, Wallace, and that a decision upon *part* of one issue of bonds is the same as a decision upon each bond and coupon composing the issue.

## IV.

### CONCLUSION.

There was no dispute about the facts of the case, and it was therefore the duty of the court to direct a verdict for the plaintiff:

*Anderson County* v. *Beal*, 113 U. S. 241–242.

The record shows affirmatively that there was a *substantial* compliance with the conditions of the vote. A delay of three months in the completion of a railroad ought not in justice and equity under any circumstances to be treated as such a substantial departure from the terms of the vote as